CASES DECIDED

IN

THE UNITED STATES COURT OF CLAIMS

JANUARY 1, 1975 TO APRIL 30, 1975

WITH

REPORT OF DECISIONS OF THE SUPREME COURT IN COURT OF CLAIMS CASES

REPORTED BY

AUDREY BERNHARDT

REPORTER

VOLUME 206

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VOLUME 206

COURT OF CLAIMS REPORTS

E R R A T A

Please make the following corrections:

Page 38: Line 36, change second word to "for"

Page 61: Footnote - change date of order to June 25, 1975.

Page 183: Title - Correct spelling of "Judgment"

Page 248: Syllabus [9], line 8 - Change "obligated" to "obliged"

Page 358: Line 15, change name of firm to "Brookes, Brookes and Vogl"

Page 597: Change numerals on the upper left side of the page to 583

Page 637: Line 3, cancelled type should not have been used on the numerals 162.

Page 871: Moderacki order, line 13, correct spelling of "Kunzig"

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Chief Judge
WILSON COWEN

Judges

OSCAR H. DAVIS
BYRON SKELTON
PHILIP NICHOLS, JR.
SHIRO KASHIWA
ROBERT L. KUNZIG
MARION T. BENNETT

Senior Judges

MARVIN JONES
JAMES R. DURFEE
DON N. LARAMORE

Chief, Trial Division
ROALD A. HOGENSON

Trial Judges

C. MURRAY BERNHARDT
MASTIN G. WHITE [1]
LLOYD FLETCHER
GEORGE WILLI
LOUIS SPECTOR
DAVID SCHWARTZ
HARRY E. WOOD
JOSEPH V. COLAIANNI
KENNETH R. HARKINS
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HAL D. COOPER
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LOU ELLA L. INGRAM

Bailiff-Marshal
CHARLES A. LINK, JR.

[1] Retired, effective January 1, 1971, and recalled as a senior trial judge.

ASSISTANT ATTORNEYS GENERAL
(Charged with the defense of the Government)

(JANUARY 1, 1975–APRIL 30, 1975)

WALLACE H. JOHNSON
Land and Natural Resources Division

SCOTT P. CRAMPTON
Tax Division

CARLA A. HILLS
(January 1, 1975–March 9, 1975)

IRVING JAFFE
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(March 10, 1975–April 30, 1975)

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§ 2096; Cheyenne-Arapaho
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DESIGNATION OF A JUDGE OF THE UNITED STATES COURT OF CLAIMS FOR SERVICE IN THE DISTRICT OF COLUMBIA CIRCUIT

The Chief Justice of the United States, the Honorable Warren E. Burger, pursuant to the authority vested in him by Title 28, United States Code, designated and assigned the Honorable Oscar H. Davis, a Judge of the United States Court of Claims, to act as a Circuit Judge of the United States Court of Appeals for the District of Columbia Circuit during periods beginning January 14, January 16 and 17 and February 6 and 7, 1975, and for such further times as may be required to complete unfinished business.

DESIGNATIONS OF JUDGES OF THE UNITED STATES COURT OF CLAIMS FOR SERVICE ON THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

The Chief Justice of the United States, the Honorable Warren E. Burger, pursuant to the authority vested in him by Title 28, United States Code, on March 20, 1975 individually designated and assigned the following judges of the United States Court of Claims to perform judicial duties of a judge of the United States Court of Customs and Patent Appeals for the period beginning April 2, 1975 and ending April 1, 1976, and for such further time as may be required to complete unfinished business:

Wilson Cowen, Chief Judge
Oscar H. Davis
Byron Skelton
Philip Nichols, Jr.
Shiro Kashiwa
Robert L. Kunzig
Marion T. Bennett

DESIGNATIONS OF JUDGES OF THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS FOR SERVICE ON THE UNITED STATES COURT OF CLAIMS

The Chief Justice of the United States, the Honorable Warren E. Burger, pursuant to the authority vested in him by Title 28, United States Code, on March 20, 1975 individually designated and assigned the following judges of the United States Court of Customs and Patent Appeals to perform judicial duties of a judge of the United States Court of Claims for the period beginning April 2, 1975 and ending April 1, 1976, and for such further time as may be required to complete unfinished business:

Howard T. Markey, Chief Judge
Giles S. Rich
Phillip B. Baldwin
Donald E. Lane
Jack R. Miller

LEGISLATION RELATING TO THE COURT OF CLAIMS

PUBLIC LAW 93–618

93RD CONGRESS, H.R. 10710

January 3, 1975

An Act

To promote the development of an open, nondiscriminatory, and fair world economic system, to stimulate fair and free competition between the United States and foreign nations, to foster the economic growth of, and full employment in, the United States, and for other purposes.

* * * * *

[Section 337 of this Act deals with unfair practices in import trade and authorizes the International Tariff Commission to issue orders preventing the importation of articles, or to issue cease and desist orders, when there is a violation of Section 337. Section 337(i) is entitled "Importations By Or For The United States," and reads as follows:]

"(i) IMPORTATIONS BY OR FOR THE UNITED STATES.—Any exclusion from entry or order under subsection (d), (e), or (f), in cases based on claims of United States letters patent, shall not apply to any articles imported by and for the use of the United States, or imported for, and to be used for, the United States with the authorization or consent of the Government. Whenever any article

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LEGISLATIVE HISTORY:

HOUSE REPORTS No. 93–571 (Comm. on Ways and Means) and No. 93–1644 (Comm. of Conference).

SENATE REPORT No. 93–1298 (Comm. on Finance).

CONGRESSIONAL RECORD:

Vol. 119 (1973): Dec. 10, 11, considered and passed House.

Vol. 120 (1974):

Dec. 5, 11–13, considered and passed Senate, amended.

Dec. 20, House and Senate agreed to conference report.

WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 11, No. 1: Jan. 3, Presidential statement.

would have been excluded from entry or would not have been entered pursuant to the provisions of such subsections but for the operation of this subsection, a patent owner adversely affected shall be entitled to reasonable and entire compensation in an action before the Court of Claims pursuant to the procedures of section 1498 of title 28, United States Code."

* * * * *

CASES DECIDED
IN
THE UNITED STATES COURT OF CLAIMS

JANUARY 1, 1975 TO APRIL 30, 1975 AND OTHER CASES NOT HERETOFORE PUBLISHED

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509 F. 2d 1166

McNAMARA CONSTRUCTION OF MANITOBA, LTD. v. THE UNITED STATES

[No. 417-73. Decided January 22, 1975]*

ON DEFENDANT'S AND PLAINTIFF'S MOTIONS FOR SUMMARY JUDGMENT

Contracts; reformation; mistake; assumption of risk; labor strikes.—Plaintiff seeks reformation of a fixed-price contract for construction for the Army Corps of Engineers of a canal lock and related structures, on the ground of an alleged mutual mistake of fact. Plaintiff's claim arises out of unusually severe labor problems during contract performance whereby plaintiff incurred additional labor (and labor-related) costs. According to plaintiff, the mutual mistake of fact was that neither plaintiff nor defendant was aware of or could possibly have anticipated the unreasonable and uncooperative attitude and conduct of the labor unions, and that both parties assumed labor would behave in a responsible fashion but that they were mistaken in that assumption. The contracting officer freely granted plaintiff time extensions for the delays resulting from the labor problems because the delays were not plaintiff's fault. Defendant denies that it entered into the contract upon the assumption of labor peace and says that this was plaintiff's unilateral assumption. In distinguishing between a risk which is known to both parties (see clauses 5 and 13 of the contract), from bona fide mutual mistake of fact, the court *holds* that under the circumstances here there was no mutual mistake of fact by the parties of the type for which judicial relief may be given by way of contract reformation.

---

*Plaintiff's motion for rehearing *en banc* denied February 28, 1975. Skelton, *Judge*, would allow the motion.

Syllabus

Defendant's motion for summary judgment is granted, plaintiff's cross-motion is denied, and the petition is dismissed.

Evidence; judicial notice; generally.

[1] The court may take judicial notice of the risk of strikes and other labor problems inherent in the vast majority of construction contracts. This is a fact of modern commercial life.

Evidence ⇐ 20(1)

Contracts; mistake; mutual mistake of fact v. assumption of risk; strikes.

[2] Where plaintiff entered into a fixed-price Government construction contract and both parties, at the time of contract execution, were fully aware of the risk of labor problems and strikes, the court will not reform the contract on the basis of an alleged mutual mistake of fact since the risk of labor difficulties was assumed as one of the elements of the contract. Plaintiff's efforts to comply with the provision of the contract placing responsibility on it to take steps reasonably necessary to ascertain the nature and location of the work and the general and local conditions which could affect the work or the cost thereof, do not alter the clear implication of the clause that the risk that local conditions, such as labor problems, will turn out to be other than plaintiff expected, falls on plaintiff.

United States ⇐ 70(22), 74(4)

Contracts; mistake; mutual mistake of fact v. assumption of risk; strikes.

[3] Where plaintiff-contractor experienced delays for which time extensions were granted and increased costs arising out of labor problems and strikes during performance of the subject fixed-price construction contract, in determining the distinction between assumption of risk and mutual mistake of fact there is no such recognizable concept as a "normal" strike and no clear line between "normal" and "severe" labor difficulties.

United States ⇐ 74(4)

Contracts; assumption of risk; fixed-price contract.

[4] In a fixed-price construction contract, the contractor assumes the risk of unexpected costs, his price for the contract taking into account such risk.

United States ⇐ 70(20)

Contracts; delays; strikes.

[5] A labor strike, beyond the control of either party, may be analogized to an act of God where, absent provision in the contract for allocation of losses arising from such act, the burden thereof is on the contractor, there being no basis for shifting the loss to the Government.

United States ⇐ 70(22)

1

Opinion of the Court

Contracts; reformation; mistake; generally.

[6] A mistake on the part of one contracting party will not provide the basis for reformation, particularly where the mistake is based on an unwarranted assumption of the party who should have known better on the basis of its experience.

Reformation of Instruments ⇐ 19(1)

Contracts; reformation; mistake; generally.

[7] With respect to any matter not made a basic assumption of the contract, the parties take their chances.

Reformation of Instruments ⇐ 16

Contracts; cost principles; compensation for increased labor costs; congressional intent.

[8] In determining a contractor's entitlement to compensation for increased labor costs arising out of strikes beyond the control of the parties occurring during performance of the subject fixed-fee construction contract, absent a basis for contract reformation the court cannot base an award by judgment upon speculation as to what Congress would have agreed to pay had it known of the increased costs.

United States ⇐ 70(23)

James H. Mann for plaintiff. *Robert E. Kline, Jr.*, attorney of record, for plaintiff.

Bernard M. Brodsky, with whom was *Assistant Attorney General Carla A. Hills*, for defendant.

Before COWEN, *Chief Judge*, SKELTON and BENNETT, *Judges*.

BENNETT, *Judge*, delivered the opinion of the court:

By fixed-price contract dated June 30, 1964, plaintiff McNamara Construction of Manitoba, Ltd. (hereinafter McNamara) undertook to construct for the Army Corps of Engineers a canal lock and related structures (New Second Lock) at St. Mary's Falls Canal, Sault Ste. Marie, Michigan.[1] The original completion date of June 30, 1967, was extended by a series of modifications to October 19, 1968. The work was completed and accepted as of that latter date and the administrative claims under the contract have been settled.

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[1] The contract is designated DA 620-064, CIVENG 64-140. Plaintiff was the low bidder.

This claim arises out of unusually severe labor problems—strikes, delays, and harassment—which plagued McNamara throughout the performance of the contract and which resulted in additional labor (and labor-related) costs. The contracting officer freely granted plaintiff extensions of time for the delays resulting from those labor problems because the delays were not McNamara's fault, but disclaimed any authority or obligation to make a financial adjustment.[2] Plaintiff's subsequent request to the Secretary of the Army for special, discretionary statutory relief pursuant to Public Law 85–804, 72 Stat. 972 (1958), 50 U.S.C. § 1431 *et seq.*, was denied.

Plaintiff now seeks to recover those additional labor costs[3] in this court on a theory of reformation of contract due to an alleged mutual mistake of fact. The mutual mistake of fact, states plaintiff, was that "neither the contractor nor the [Engineering] Corps was aware of or could possibly have anticipated the unreasonable and uncooperative attitude and conduct of the labor unions." Plaintiff says both parties assumed labor would behave in a responsible fashion but they were mistaken in that assumption. As proof of the alleged mutual mistake, plaintiff notes that the Government's estimate of the cost of the project, $22,189,692, was roughly equivalent to plaintiff's bid of $21,471,690; yet, after accounting for modifications, the unanticipated labor costs swelled the ultimate cost of the project allegedly in excess of $6 million above those figures.

Plaintiff's claim must fail. There was, simply, no mutual mistake of fact by the parties of the type for which judicial relief may be given. Both parties, at the time of executing the contract, were fully aware of the potential for labor difficulties. This awareness is reflected in clause 5 of the contract, which states in relevant part:

> 5. TERMINATION FOR DEFAULT—DAMAGES FOR DELAY—TIME EXTENSIONS
>
> * * * * *

[2] The contracting officer's position that neither he nor any contract appeals board has jurisdiction to consider plaintiff's claim for additional labor costs is undisputed by the parties.

[3] The additional cost of labor is asserted to be $6,312,817.21.

(d) The Contractor's right to proceed shall not be so terminated nor the Contractor charged with resulting damage if:

(1) The delay in the completion of the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor, including * * * strikes * * *.

Even were the above provision not in the contract, we could take judicial notice of the risk of strikes and other labor problems inherent in the vast majority of construction contracts. This is a fact of modern commercial life. Neither the contractor nor the Government could be presumed ignorant of this risk. Defendant denies that it ever entered into the contract upon the assumption of labor peace and says that this was just plaintiff's unilateral assumption.

What we have in the instant case, therefore, is a risk which is known to both parties and results from human inability to predict the future. The authorities are unanimous in distinguishing such risks from bona fide mutual mistakes of fact. In 13 WILLISTON, CONTRACTS § 1543 (3d ed. 1970) at 75, it is said:

> * * * there must be excluded from consideration mistakes as to matters which the contracting parties had in mind as possibilities and as to the existence of which they took the risk. * * *.

A similar statement is made in 3 CORBIN, CONTRACTS § 598 (2 ed. 1960) at 585–86:

> * * * The same result obtains in any case where the risk of the existence of some factor or of the occurrence of an event is consciously considered in agreeing upon terms. There is no mistake; instead, there is awareness of the uncertainty, a conscious ignorance of the future. * * *.

The RESTATEMENT, CONTRACTS § 502, comment *f*, reinforces the distinction:

> Where the parties know that there is doubt in regard to a certain matter and contract on that assumption, the contract is not rendered voidable because one is disappointed in the hope that the facts accord with his wishes. The risk of the existence of the doubtful fact is then assumed as one of the elements of the bargain.

See also Leasco Corp. v. *Taussig*, 473 F. 2d 777 (2d Cir. 1972).

Plaintiff argues, however, that while both parties may have been aware of the risk of a "normal" strike, neither party anticipated the severe labor difficulties which eventuated. This attempted distinction based on the degree of the difficulties encountered is fallacious. First, there is no evidence whatsoever that defendant ever thought in terms of a "normal" as opposed to a "severe" strike. Secondly, the distinction is unworkable as a practical matter, because there is no such recognizable concept as a "normal" strike, and no clear line between "normal" and "severe" difficulties. Furthermore, it is unlikely that the parties to a contract of this type ever *plan* for the most unfavorable outcome, even though they are aware of the risk of such an outcome.[4]

In those circumstances, not present here, in which we are able to identify a mutual mistake of fact, we still cannot grant reformation if the contract puts the risk of the mistake upon the party asking reformation. *National Presto Industries, Inc.* v. *United States*, 167 Ct. Cl. 749, 764, 338 F. 2d 99, 108 (1964), *cert. denied*, 380 U.S. 962 (1965). In the instant case, the risk of labor strife was placed, both explicitly and implicitly by the contract, on McNamara.

Clause 13 of the contract places responsibility on the contractor to take steps "reasonably necessary to ascertain the nature and location of the work, and the general and local conditions which can affect the work or the cost thereof. Any failure by the Contractor to do so will not relieve him from responsibility for successfully performing the work without additional expense to the Government." Plaintiff assures the court, and we see no reason to doubt the fact, that plaintiff visited the site prior to bidding, and investigated as best it could the availability and cost of labor in the area. Plaintiff's effort to comply with clause 13 does not, however, alter the clear implication of the clause that the risk that local

[4] Compare RESTATEMENT, CONTRACTS § 502, illustration 8, at p. 965:

"8. A contracts with B to dig a trench in a stated place. Owing to frozen ground A cannot make a thorough examination of the character of the soil. The fact that the soil is such as to make excavation materially *more difficult than either A or B supposes* does not make the contract voidable, if the parties did not base their contract on any particular condition of the soil." [Emphasis supplied.]

conditions will turn out to be other than plaintiff expected falls on plaintiff. We have previously held, for example, that the presence of such a clause in a contract placed the risk of a mistake as to subsurface materials on the contractor. *Flippin Materials Co.* v. *United States*, 160 Ct. Cl. 357, 312 F. 2d 408 (1963). In *Flippin* the contractor did not make an adequate on-site investigation but did argue for reformation. In stating principles useful to us in resolving the instant case, the court said:

> * * * a mutual mistake as to a fact or factor, even a material one, will not support relief if the contract puts the risk of such a mistake on the party asking reformation (*United States* v. *Hathaway*, 242 F. 2d 897 (C.A. 9, 1957)), or normally if the other party, though made aware of the correct facts, would not have agreed at the outset to the change now sought * * *. [160 Ct. Cl. at 368, 312 F. 2d at 415.]

Continuing, the court stated further:

> * * * The elaborate contract provisions on "Site Investigation and Representations", [footnote omitted] together with the omission of the usual changed conditions clause, show that the risks of mistakes as to subsurface materials were deliberately placed on the plaintiff; in the absence of misrepresentation, the contractor was to be bound by what he met during performance. * * *. [160 Ct. Cl. at 368–69, 312 F. 2d at 415–16.]

Plaintiff McNamara does not claim any misrepresentation by defendant, only mutual ignorance. But, the site investigation (disclaimer) clauses in the two cases are similar in indicating that the contractor carries the risk of mistake arising from his investigation of "general and local conditions which can affect the work or the cost thereof."

Also in *Flippin*, there was labor trouble for which the parties were not to blame. The court held this gave plaintiff no right to recover the losses arising therefrom for such recovery would be "an unauthorized gratuity without consideration." 160 Ct. Cl. at 371, 312 F. 2d at 417.

The fact that McNamara's contract provided for extensions of time in the event of delay due to strikes and other causes (clause 5(d)(2)), but not for compensation of costs

arising out of strikes, is also significant in light of traditional allocation of risks in a fixed-price contract. The rule is succinctly stated in *United States* v. *Spearin*, 248 U.S. 132, 136 (1918):

> * * * Where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered. * * *.

We have consistently held that the contractor in a fixed-price contract assumes the risk of unexpected costs. *Sperry Rand Corp.* v. *United States*, 201 Ct. Cl. 169, 181, 475 F. 2d 1168, 1175–76 (1973); *Aerojet-General Corp.* v. *United States*, 199 Ct. Cl. 422, 434, 467 F. 2d 1293, 1300–01 (1972); *Rolin* v. *United States*, 142 Ct. Cl. 73, 82, 160 F. Supp. 264, 268–69 (1958). *See also* 3 CORBIN, CONTRACTS § 598 (2d ed. 1960) at 590. In firm fixed-price contracts, risks fall on the contractor, and the contractor takes account of this through his prices. Nash, *Risk Allocation in Government Contracts*, 34 GEO. WASH. L. REV. 693, 694–96, 701–02 (1966).

A labor strike, beyond the control of either party, may be analogized to an act of God. In *Tombigbee Constructors* v. *United States*, 190 Ct. Cl. 615, 420 F. 2d 1037 (1970), the flooding of a borrow pit from which the contractor was to obtain dirt delayed work and raised costs. We found that neither party had made rain, or the lack of it, a basis of the bargain, and that the contract was silent as to the allocation of the loss. The burden of this act of God, therefore, was left on the contractor, for there was no basis for shifting the loss to defendant. Only an extension of time was available for relief. 190 Ct. Cl. at 627, 420 F. 2d at 1043. In light of clauses 5 and 13 in the McNamara contract, there is even less basis for shifting McNamara's loss to the Government. *See also Day* v. *United States*, 245 U.S. 159 (1917); *Amino Bros. Co.* v. *United States*, 178 Ct. Cl. 515, 372 F. 2d 485, *cert. denied*, 389 U.S. 846 (1967); *Arundel Corp.* v. *United States*, 103 Ct. Cl. 688, *cert. denied*, 326 U.S. 752 (1945).

Plaintiff relies heavily on our *National Presto* decision, *supra*. *National Presto* is distinguishable from the instant case, however, on every count. In that case the contractor had

agreed to produce 105-mm. shells by a new experimental method. Prior to contract, the parties had mutually agreed after discussion that the shells could be produced without the use of turning equipment. This belief proved incorrect. We held that the unanticipated need for turning equipment was a mutual mistake of fact. We also held that plaintiff should not assume the entire risk, because the parties were engaged in a "joint enterprise" in which the Government was just as interested in the "perfection of the new process" as in the end product. 167 Ct. Cl. at 764, 338 F. 2d at 108–09. We further noted that because of the Government's interest in perfecting the process, it received a direct benefit from the costs expended in determining that turning machines were required. Finally, we noted that "[s]ince the Government was to pay for the machines, [footnote omitted] in the area of equipment the agreement was at least as close to a cost contract as to a fixed-price one." 167 Ct. Cl. at 765, 338 F. 2d at 109. Based on the peculiar facts of the case, we awarded the contractor one-half of the unanticipated cost.

In cases subsequent to *National Presto* we have made it very clear that the result in that case was reached on the unique facts there presented. *See*, for example, *Sperry Rand Corp.* v. *United States*, *supra*; *Olin Mathieson Chem. Corp.* v. *United States*, 179 Ct. Cl. 368, 408 (1967); and *Natus Corp.* v. *United States*, 178 Ct. Cl. 1, 371 F. 2d 450 (1967). In the instant case we have seen that there was no mutual mistake of fact as to the risk of labor difficulties. There was, moreover, no "joint enterprise" and no experimental value to the Government in the process used to build the New Second Lock. The Government received no benefit from the additional costs of the labor strikes and expressed no willingness to assume such costs. Nor can such willingness be fairly inferred, as in *National Presto*. McNamara's contract was a fixed-price agreement to build a lock, and defendant got only what it contracted for in that contract. The risks were assigned to plaintiff by the contract.

Other cases cited by plaintiff are inapposite. In *Poirier & McLane Corp.* v. *United States*, 128 Ct. Cl. 117, 120 F. Supp. 209 (1954), both the Government and the contractor intended

the payment to labor of "the prevailing wage rate," which the parties believed was 85 cents. This rate was thus stated in the contract. In fact, however, the prevailing rate was $1 per hour, and since the court found that both parties intended that the contract should contain the actual rate, we reformed the contract to reflect such intent. *Accord*, *Southwest Welding & Mfg. Co.* v. *United States*, 179 Ct. Cl. 39, 373 F. 2d 982 (1967); *Stafford* v. *United States*, 109 Ct. Cl. 479, 507, 74 F. Supp. 155, 159–60 (1947). In the McNamara contract, however, the Government's only intent was to pay the fixed price set by the contract. *Cf. Evans Reamer & Machine Co.* v. *United States*, 181 Ct. Cl. 539, 552, 386 F. 2d 873, 880–81 (1967), *cert. denied*, 390 U.S. 982 (1968). No assumption of labor harmony was made a basis of the bargain, there was no understanding or commitment by defendant to pay "the prevailing wage rate" or actual labor costs, and defendant had no duty to warn this experienced contractor to beware of potential labor difficulties other than as suggested by clauses 5 and 13. For reformation we would need some antecedent expressions by the parties at variance with the terms of the contract or some articulated mutual assumption regarding labor behavior which we could incorporate into the agreement or some indication that a mutual mistake existed as to a hard fact on which the parties had based the contract. A mistake on the part of one contracting party will not provide the basis for reformation, particularly where it is based on an unwarranted assumption of the party who should have known better on the basis of its experience. *Olin Mathieson Chem. Corp.* v. *United States*, *supra*. Reformation based on such assumption or on inference arising from the contract price would render fixed-price contracts meaningless and throw the procurement process into chaos.

Plaintiff reminds us of our statement in *Peter Kiewit Sons' Co.* v. *United States*, 109 Ct. Cl. 517, 523, 74 F. Supp. 165, 168 (1947), that a contract with the Government should not be a "gambling transaction." Plaintiff is mistaken, though, if it would interpret this statement as a repudiation of the concept of entrepreneurial risk. In *Peter Kiewit*, the contractor was required to bid a unit price per cubic yard for borrow

excavation, based on estimates of the amount of excavation necessary to permit the construction of airfield runways at a certain grade. After work had begun, the Government changed the finished grade for borrow excavation, thereby reducing significantly the amount of excavation to be done. Though the reduced quantity of excavation raised the contractor's unit cost, the Government refused to accede to a change in contract terms on the ground that the contract's "quantities" clause had alerted the contractor that ultimate quantities might be more or less than the estimates. We held in favor of the contractor, stating that the contractor properly believed that the estimates would prove approximately correct. It can be seen from the above recitation of facts that, unlike the labor costs incurred by McNamara, the increased unit costs in *Peter Kiewit* were the result of the Government's changing a key assumption of the contract. The Government's estimates and the contractor's planning were based on a particular grade of excavation. When the Government changed the grade, it changed the basis of the bargain. In contrast, an absence of labor strife was not the basis of McNamara's bargain. Williston cites our *Flippin Materials* and *National Presto* cases as authority for the rule that "[w]ith respect to any matter not made a basic assumption of the contract, the parties take their chances." 13 Williston, Contracts § 1543 (3d ed. 1970) at 75. The contract here cannot be reformed to reflect such expression and intent as plaintiff asserts. We simply do not have a mutual mistake. On the contrary, as pointed out above, clauses 5 and 13 of the contract refute it by showing that labor trouble was anticipated, considered, and resolved by those clauses. That is the mutual intent and basic assumption that the parties here did express and it governs the case. It is true that neither party to the contract was to blame for the illegal, unreasonable labor trouble and misbehavior that increased plaintiff's costs. But, that does not justify a shift of such costs to defendant unless defendant had agreed to accept them or, as *National Presto* teaches, "would have been willing, if it had known the true facts from the beginning, to bear a substantial part of the additional expenses." 167 Ct. Cl. at 769,

338 F. 2d at 112. Here, it not only did not so agree but, in anticipation of difficulties, wrote the contract in such a way as to avoid their burden.

Virginia Eng. Co. v. *United States*, 101 Ct. Cl. 516 (1944), and *Tobin Quarries, Inc.* v. *United States*, 114 Ct. Cl. 286, 84 F. Supp. 1021 (1949), provide no support for plaintiff's claim. Both cases involved misrepresentation by the Government. There was no Government misrepresentation in the instant case.

In research and development contracts where costs are uncertain, the parties often agree to share those that cannot be foreseen. In fixed-price contracts, such as here where some risks are under control of third parties, if the Government intends to pay a part or all of the labor or material costs whatever they might be (otherwise the price might be much higher to cover the risk), such cost estimates frequently are not required to be included in bid estimates. Instead the contract incorporates an article for escalation adjustments in price according to an agreed formula reflecting labor or material cost increases during performance. This makes certain that the contractor will not lose a reasonable profit due to such contingencies. *Cf. Bethlehem Steel Corp.* v. *United States*, 191 Ct. Cl. 141, 423 F. 2d 300 (1970). Defendant put no such clause in the contract here nor even a changed conditions clause for extra work. Absence of such negates belief that defendant intended at the outset to agree to the relief now sought or did not intend to put the risk of changed conditions on the contractor alone. This brings the problem within the *Flippin* rule where the contractor also tripped over both obstacles. Plaintiff would convert this fixed-price contract into a cost-plus contract and make the defendant an insurer upon the assumption that Congress wanted the project so badly that it would pay any price for it.

However sympathetic we may be to plaintiff's hardship, we can find no basis for plaintiff's recovery as a matter of law or in equity through contract reformation. We cannot assume that had it known these increased labor costs were inevitable Congress would have agreed to pay for them. We cannot base an award by judgment upon speculation or in-

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ference as to congressional attitudes. In *Stafford* v. *United States*, *supra*, and *Flippin Materials Co.* v. *United States*, *supra*, and in *Ozark Dam Constructors* v. *United States*, 153 Ct. Cl. 120, 288 F. 2d 913 (1961), the court held that it could not grant an equitable adjustment to restore a contractor's losses due to labor troubles for which the parties to the contract were not to blame. There, as here, increased costs arising from labor troubles were not caused or desired by the contracting parties and neither could have prevented the same.

Defendant's motion for summary judgment is granted. Plaintiff's cross-motion for summary judgment is denied. The petition is dismissed.

SKELTON, *Judge*, dissenting:

I respectfully dissent, because I believe that if justice is to be done in this case the court should use its equitable powers and reform the contract because of mutual mistake of material existing fact. It is not fair, right, nor just to require the contractor to bear the huge loss incurred in the performance of the contract when such loss was not the result of any negligence, fault, or lack of responsibility on the part of the contractor, nor of the government, but was the result of mutual mistake of fact by the parties when they entered into the contract, as shown below.

In my opinion there was a mutual mistake of fact by the contractor and the government in three areas, all of which are related as follows:

1. The parties entered into the contract under the assumption and belief that in its performance the contractor would have the use of labor that would act responsibly and that he would have no more than normal labor difficulties.

2. In agreeing on a fixed price in the contract, the parties included an amount that the contractor would have to pay in performing the contract for responsible labor based on prevailing rates in the area.

3. The parties agreed on the length of time it would take to complete the project and fixed June 30, 1967, as the com-

pletion date. This agreement was based on their belief that the contractor would have the use of responsible labor who would not unduly delay the project, and that he would have no more than normal labor difficulties.

The mutual mistake of fact in these three areas will now be discussed in the order listed above.

I

The Irresponsible Conduct of Labor and the Abnormal Labor Difficulties

The irresponsible conduct and outrageous misbehavior of labor in this case shocks one's sense of justice. The constant harassment of the contractor by the members of the labor unions and by the unions themselves, their unreasonable demands and threats, and their disruptive, arbitrary, and capricious acts throughout the performance of the contract created an impossible and incredible situation that was nothing short of an outrage. Their demands and threat at times were little short of hooliganism, and their disruptive and damaging conduct indicated they were bent on mischief and sabotage if their unreasonable demands were not met.

It is impossible to adequately describe in a few words the specific disruptive and irresponsible acts of labor in this case. However, it appears to be necessary to show these acts in detail so that this phase of the case may be properly presented. The plaintiff has described them in vivid detail in its petition where it is alleged in pertinent part as quoted below:

"10. No other labor was obtainable in this remote corner of northern Michigan when the contractor sought to replace workmen fired for cause, such as playing cards on the job, striking a supervisor, or just plain loafing. Accordingly, in order to avoid or shorten work stoppages, plaintiff had no alternative but to rehire workmen fired for cause when their rehiring was demanded by the labor unions. It was impossible to deal with the irresponsible attitudes of the local labor unions in this remote tight labor market, and the local unions

were not properly or adequately guided by their regional supervisors.

"11. Many labor difficulties arose from jurisdictional disputes between the various trade unions concerning which should handle various types of work. The Contracting Officer used his best efforts to prevent work stoppages and to hold the time lost to a minimum, but his efforts were fruitless. Consequently, the contractor remained helpless, and had no alternative but to yield to unreasonable labor demands in order to get work going again. The contractor was at fault in no way in these disputes between trade unions as to who should do the work. He could only try to help them adjust their differences, and to await the trades settling their disputes between themselves, or hire dual crews to perform the work contested in these jurisdictional controversies. All the labor unions represented in work on this contract engaged in jurisdictional disputes, including strikes and other work stoppages. The Operating Engineers, the Carpenters, and the Laborers Unions were particularly contentious, but the Plumbers, the Pipe Fitters, the Ironworkers, the Electricians, the Cement Workers, the Painters, the Teamsters, the Millwrights, the Asbestos workers and the Marine Workers Unions were also involved in a number of jurisdictional disputes resulting in work stoppages or the use of dual crews. When a picket line was established by one union, none would cross it. Even when there was no picket line, a work stoppage by one of the trades affected all of them.

"12. The Operating Engineers Union was repeatedly engaged in jurisdictional disputes with the Laborers Union, as well as with other unions, with the result that there were long work stoppages in each case which delayed performance and greatly increased the costs of performing the contract. As an example, only four months after contract performance had begun the preceding July, there was a jurisdictional dispute between the Operating Engineers and the Laborers Unions with a work stoppage of 10 days (November 7–17, 1964) regarding who should operate air-trac drills modified to work on rails. It was finally agreed that the Laborers would operate all air-trac drills on rails. However, the Oper-

ating Engineers took advantage of this same work stoppage (1) to insist that they be permitted to hire any additional personnel needed in this work; (2) to insist that their Chief Master Mechanic be responsible for the assignment of all workmen engaged in supervision of maintenance and repair work; and (3) to protest the lay-off of 17 men temporarily not needed. They only returned to work when two members of their union were rehired. This 10 day work stoppage affected all trades, as they refused to work while it continued.

"13. In December 1964, there were two jurisdictional disputes, one lasting two days between the Pipefitters and the Operating Engineers Unions, and the other lasting 10 days between the Operating Engineers and the Laborers Unions, over the operation of the core drilling equipment. It was finally decided that the Operating Engineers would operate all core drills, and it was reiterated that the Laborers would operate all trac drills. This was followed by another jurisdictional dispute in January 1965 between the same two unions, causing a five day work stoppage (January 25–30, 1965) over who should operate and service air-trac drills not mounted on rails. It was agreed that the Laborers would operate the drills, but the Operating Engineers would maintain and move them.

"14. There was a jurisdictional dispute between the Operating Engineers and the Carpenters Unions resulting in a work stoppage lasting 16 days (August 13–29, 1965) over who would be responsible for drilling timber fender angles. It was finally agreed that the Carpenters would operate the drill presses in this work.

"15. An oiler was discharged for striking one of the plaintiff's supervisors. This resulted in a 12 day work stoppage (April 29–May 11, 1966) until the matter was submitted to arbitration. After arbitration, it was held that such conduct was not to be condoned, but the workman was permitted to return to work without back pay.

"16. In June 1966, there was a jurisdictional dispute between the Ironworkers and the Carpenters Unions over which should do the welding on the parapet curb angles. The Ironworkers claimed jurisdiction on work that had been as-

signed to the Carpenters in 1965. A picket line was established, which all unions refused to cross. The matter was referred to the National Joint Board, which ordered the picket line removed, since there was no basis for changing the original assignment to the Carpenters. Nevertheless, this jurisdictional dispute resulted in an intermittent work stoppage totalling 10 days between June 10 and July 28, 1966.

"17. In March 1965, a laborer was dismissed for playing cards on the job during working hours. The Laborers Union struck and established a picket line, which was only removed after an agreement that the man be permitted to return to work. There was, however, a work stoppage of five days (March 20–25, 1965).

"18. There was a series of some 60 work stoppages when members of the Carpenters Union refused to work in the rain, even though the rain was just a drizzle and notwithstanding that other work was available for them in sheltered areas. In these instances, other trades continued to work. However, these unjustified work stoppages by the Carpenters caused a great increase in cost, since the time lost by failure to work had to be made up in large measure on an overtime basis.

"19. Due to the obstructionistic attitude of the Operating Engineers, the contractor was forced to cancel its work program for the winter of 1966–1967, although there was work that could have been done.

"20. In May 1967, there was a jurisdictional dispute between the Ironworkers and the Millwrights Union over the alignment of wall groins prior to gate erection. The Ironworkers staged a wildcat walkout, and the question was referred to the International Unions. In the interval, however, since the contractor was helpless in this jurisdictional dispute, dual crews were employed to maintain peace between the two unions. The Ironworkers returned to work, but two work days were lost.

"21. In July 1967, there was a jurisdictional dispute between the Carpenters and the Laborers Unions regarding the handling of forming materials following their final usage, which resulted in a work stoppage of two days. To get the

work going again, it was necessary to make a financial settlement with the Carpenters, even though the work continued to be done by the Laborers.

"22. In March 1968, there was a 13 day work stoppage due to a jurisdictional dispute between the Plumbers and the Pipefitters Unions with regard to the employment of a working foreman. The foreman was changed to a non-working category.

"23. In May 1968, the Laborers Union struck and established a picket line, which was respected by all Unions, because of its illegal insistence upon a new contract even though the old contract under which they worked had not yet expired. The Union's demands were finally accepted, but not until after a 54 day work stoppage.

"24. In June 1968, the Masons Union refused to report for work until a new wage agreement was accepted, although the current agreement was still in effect. McNamara sought a court injunction. An out-of-court financial settlement was finally reached, but not until after a 16 day loss of time.

"25. In August 1968, members of the Asbestos Workers Union went on strike while a new agreement was under negotiation, resulting in a work stoppage of 46 days.

* * * * *

"27. These several trade unions continually harassed the plaintiff by refusing to work, calling wildcat strikes, and setting up picket lines which members of the other unions refused to cross, even when the strikers' complaints were without justification or merit.

"28. In addition, the contractor's losses were increased because of unjustified featherbedding practices which, like the jurisdictional disputes, plaintiff was helpless to correct. There were threats of work stoppage to prevent automation. There were many instances where another worker, upon the insistence of the Operating Engineers Union, was required to attend each pump, compressor, and the like, when, in fact, one worker could have attended several. Many trade unions insisted upon having standby workers when another trade was engaged in the actual work, such as in cases of moving machinery on the island and the use of a portable

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welding machine used by other than the Operating Engineers. The Teamsters and Operating Engineers insisted upon at least one teamster or operator being with a truck or other piece of equipment while it was being moved over the water from one part of the island to another, even though the particular equipment had not been used prior to the move and was not going to be used immediately thereafter. The Marine Unions refused to work overtime, and it was impossible to get members of other trades off the island at the end of their shifts without engaging the Marine workers for an additional shift."

The government does not deny nor contest these allegations and in effect has agreed that they are true. The contracting officer on the job recognized the agonizing and abnormal labor situation that confronted the contractor and unhesitatingly granted numerous time extensions because of it. After the completion of the contract, the contractor applied to the Army Contract Adjustment Board for extraordinary contractual adjustment under Public Law 85-804. The Board in denying discretionary relief found significantly that as a result of labor problems "the contractor experienced 85 separate periods of work stoppages totaling 303 days." The Board also found that the contractor "did encounter more labor difficulties than normal." This finding is indeed a mild description of the actual labor situation on the job. As will be more specifically pointed out later, the contractor began work in July 1964, with a contract completion date of June 30, 1967, which allowed about three years to complete the project. The work stoppages of 303 days as found by the Board shows that during approximately one-third of the contract period, work on the project was idle because of labor difficulties. This meant that during one out of every three days, approximately, no work was done because of the irresponsible acts of labor.

In view of the foregoing, no one can argue that the contractor performed the contract under normal labor conditions. Neither can it be contended that the contract was performed with normal labor difficulties. While it may be somewhat difficult in an ordinary run-of-the-mill case to

determine what are "normal labor conditions" or what constitutes "normal labor difficulties," we have no problem with such determinations in this case. The overwhelming evidence shows without question the abnormal labor difficulties the contractor encountered, and the government admits this is true.

Prior to the execution of the contract there was nothing to put the contractor or the government on notice or even on inquiry that irresponsible labor conduct or more than normal labor difficulties would be encountered by the contractor. Consequently, the parties entered into the contract believing that the contractor would have the use of labor that would act responsibly and that he would have no more than normal labor difficulties. As can be seen from the foregoing facts, this was a mutual mistake of material fact for which neither party was responsible.

II

The Amount Included in the Contract for the Cost of Responsible Labor Based on Prevailing Rates in the Area

Before the execution of the contract, the contractor made a thorough and painstaking investigation as to the availability of labor and the prevailing rates for such labor in the area of the project. Based on the information thus obtained, the contractor estimated that responsible labor would cost $6,162,066 and included that amount for labor in its bid of $21,471,690 for the project. The contract was awarded to the contractor for this amount. The government had estimated the total cost would be $22,189,692, in which amount the estimated cost of labor was included. However, the record does not show the amount of the government's estimate for labor. Nevertheless, government counsel admitted in oral argument that the estimate of the government for labor costs was far below the amount the contractor was required to pay, which amount is set forth below. Actually, as will be demonstrated, the government's estimate for the cost of labor was not much different to that of the contractor. This conclusion is arrived at in the following manner. The plaintiff was awarded the contract for a fixed price of $21,471,690

and during the performance of the contract various change orders increased the contract price to $23,347,638.48, an increase of $1,875,948.48. As pointed out above, the government had estimated the total cost would be $22,189,692. By adding the increase of $1,875,948.48 by reason of the change orders, the government's estimate would be the sum of $24,065,640.48 in comparison with the final contract price to be paid to the plaintiff in the sum of $23,347,638.48. However, the total cost to the plaintiff was $29,660,455, which included $14,222,624 for labor instead of $6,162,066 that the plaintiff had estimated, resulting in a difference of $8,060,558.

By subtracting the government's estimate plus the increase caused by the change orders, all in the total sum of $24,065,640.48 from the total cost of the project in the sum of $29,660,455, we see that the government's estimate was $5,594,814.52 less than the total cost of the job. The plaintiff says it lost $6,312,817.21 on the job and that this was caused by the irresponsible conduct of labor described above. While, as stated above, we do not know the exact estimate of the government for labor, it would appear that it was not far different from that of the plaintiff, because the difference between the government's original estimate in the sum of $22,189,692 was only $718,002 more than the plaintiff's bid of $21,471,690 in which the plaintiff had estimated labor would cost $6,162,066. Furthermore, the government's original estimate plus the increase by the change orders, all in the total sum of $24,065,640.48 was $5,594,814.52 less than the total cost of the job in the sum of $29,660,455, which was only $718,002.69 less than plaintiff lost on the job. (Plaintiff's loss of $6,312,817.21 less $5,594,814.52 equals $718,002.69.)

These figures show that the amount included in the contract for labor costs was based on almost identical estimates by both the contractor and the government. It appears clear that both parties agreed in effect that the plaintiff's bid of $21,471,690 in which was included $6,162,066 for labor was in line with the estimates of both parties, and that the estimated cost of labor was realistic and was based on the reasonable cost of responsible labor in the area of the project. The parties entered into the contract on this basis in good

faith. However, as shown above, instead of labor costing $6,162,066, it cost $14,222,624, because of the irresponsible and outrageous misbehavior of labor as previously pointed out, which could not be anticipated by the parties. Consequently, the contractor and the government entered into the contract under a mutual mistake of material fact as to the cost of labor.

III

The Agreement in the Contract as to the Time Required to Complete the Project

Work was started on the project by the contractor in July 1964. The parties agreed that the completion date would be June 30, 1967. This agreement as to the length of time that would be required to complete the project was based on the considered judgment of the parties that with the cooperation of responsible labor and with no more than normal labor difficulties, the contractor would complete the work by the agreed upon completion date. However, as has been shown, the contractor did not have responsible labor, but had members of labor unions who acted like hoodlums; and because of their conduct, the contractor had an inordinate amount of abnormal labor difficulties. As stated above, the Army Contract Adjustment Board found that the bad conduct of labor caused work stoppages totaling 303 days. This resulted in so much delay that the project was not completed until October 19, 1968, which was 15 months and 19 days after the agreed upon completion date of June 30, 1967.

These facts show that the parties entered into the contract under a mutual mistake of material fact as to the length of time that would be required to complete the project.

IV

Reformation of the Contract

Where a mutual mistake of fact by contracting parties has been shown to exist, this court, in the exercise of its equitable powers, has not hesitated to reform the contract. In *Walsh* v. *United States*, 121 Ct. Cl. 546, 102 F. Supp. 589

(1952) the contract provided that the contractor would pay the prevailing rate of $1.12 per hour for labor. It developed later that the prevailing rate was $1.20 per hour. It was clear that the parties had by mutual mistake contracted on the basis of a fact which did not exist. The court reformed the contract so as to allow the contractor to recover the increased cost for labor that he had to pay. The court said:

> * * * We think that, because of their mutual ignorance of a material existing fact, they made a writing which they would not have made but for that ignorance; that if they had been aware of the actual fact, they would have negotiated and contracted on that basis. We conclude, therefore, that the plaintiff may recover its additional labor costs of $16,171.44 [*Id.* at 554, 102 F. Supp. at 591.]

A similar case was *Poirier & McLane Corp.* v. *United States*, 128 Ct. Cl. 117, 120 F. Supp. 209 (1954). In that case the parties contracted on the basis that the prevailing wage rate for labor was 85 cents per hour when it was actually $1.00 per hour. The court reformed the contract on the basis of mutual mistake of fact to reflect the actual wage rate. The court said:

> In any event, however, the parties contracted in the circumstances of this case under a mutual mistake of fact. Because of their mutual ignorance of the actual prevailing wage rate for unskilled laborers, as subsequently determined by the Secretary of Labor, the contract as executed did not reflect the true intent of the parties to the transaction. See *Walsh* v. *United States*, 121 C. Cls. 546. * * * This court may, and it is its duty, in the exercise of its equitable jurisdiction, and for the purpose of awarding or refusing to award a money judgment against the United States, to reform the contract so as to reflect the true understanding and intent of the parties to it. *Sutcliffe Storage and Warehouse Co., Inc.* v. *United States*, 125 C. Cls. 297, and cases there cited. We do so here by correcting the erroneous wage rate contained in the specifications, and basing our judgment on the contract as reformed. [*Id.* at 127, 120 F. Supp. at 214–15.]

In *Walsh* and *Poirier* the mutual mistake of fact was the assumption and belief by the parties that particular wage rates existed as prevailing rates when in fact they did not so exist. In like manner, in our case, a mutual mistake of fact was the assumption and belief by the parties that adequate responsible labor existed in the project area that would perform the work in a responsible and timely manner when in fact such labor did not exist at all in that area. While the facts in these cases are different, the underlying principles as to mutual mistake of fact and reformation are common to all of them.

In *Southwest Welding & Mfg. Co.* v. *United States*, 179 Ct. Cl. 39, 373 F. 2d 982 (1967), both parties to a contract made estimates as to the cost of steel based on $7.53 per 100 pounds which both parties believed the contractor would have to pay for it. The contract was signed on this basis. After the execution of the contract, the contractor discovered that the price of steel was $7.98 per 100 pounds instead of $7.53. The court held that there was a mutual mistake of fact and reformed the contract. The court held:

> * * * Where there has been a mutual mistake of fact causing the terms of the written contract to depart from the parties' actual understanding, this court, like other courts, will normally grant reformation. See, *e.g.*, *Sutcliffe Storage & Warehouse Co.* v. *United States*, 125 Ct. Cl. 297, 112 F. Supp. 590 (1953); *Chernick* v. *United States*, 178 Ct. Cl. 498, 372 F. 2d 492 (1967). There is convincing evidence that such a mistake was present here. [*Id.* at 51, 373 F. 2d at 989–90.]
>
> * * * * *
>
> Both parties, however, were guilty of mutual mistake—the burden of which currently rests on plaintiff alone. * * * The Government, also, although it had made cost estimates, was unaware that the contract had not represented the plaintiff's actual costs. The agreement, as written, conferred benefits upon the Government which neither party desired or intended.
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> Divergence of understanding from formal embodiment, such as this case reveals, is not at all novel, either in general contract litigation or in this court. Reformation of a contract to correct the parties' defectively expressed intention was the basis of the decision, for

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example, in *Walsh* v. *United States*, 121 Ct. Cl. 546, 102 F. Supp. 589 (1952). * * * The court reformed the contract. A similar situation exists here and the remedy of reformation is equally available.

The defendant claims that, at best, this is a case of the parties' common ignorance of the actual facts which, it argues, is never ground for reformation. See 5 Williston, Contracts § 1548, at 4341 (Rev. ed. 1937). We are clear that this court has not adopted that broad a rule. * * * [Footnote omitted.] [*Id.* at 52–53, 373 F. 2d at 990.]

The court stated further:

> * * * In allowing reformation in the *Walsh* case, *supra*, the opinion stated: "We think that, because of their mutual ignorance of a material existing fact, they [the parties] made a writing which they would not have made but for that ignorance; that if they had been aware of the actual fact, they would have negotiated and contracted on that basis." 121 Ct. Cl. at 554, 102 F. Supp. at 591. See also *Poirier & McLane Corp.* v. *United States*, 128 Ct. Cl. 117, 120 F. Supp. 209 (1954) (reformation granted where mutual mistake of fact was the parties' mutual ignorance of the actual prevailing wage rate for area laborers, resulting in costs above those stated in written contract); *National Presto Indus., Inc.* v. *United States*, 167 Ct. Cl. 749, 338 F. 2d 99 (1964), *cert. denied*, 380 U.S. 962 (1965), and cases cited. * * * [*Id.* at 53, 373 F. 2d at 991.]

It is true that the court in that case found that it was the intention of the parties that the government pay the cost of the steel regardless of what it was, and to that extent the case is distinguished on the facts from the instant case. However, the court's discussion of mutual mistake and reformation of contracts by reason thereof is especially applicable to the case before us. The statement by the court that this court has never adopted Williston's broad rule (5 Williston, *Contracts* § 1548, at 4341 (Rev. Ed. 1937)) that common ignorance of the actual facts is never ground for reformation, is especially significant in our case. Along the same line, the court quoted with approval the statement from the *Walsh* case (quoted above) that because of the mutual ignorance of a material existing fact the parties made a writing which

they would not have made but for that ignorance, and that if they had been aware of the actual fact, they would have negotiated and contracted on a different basis, citing *National Presto Indus., Inc.* v. *United States*, 167 Ct. Cl. 749, 338 F. 2d 99 (1964), *cert. denied*, 380 U.S. 962 (1965).

It is uncontroverted that the parties in the instant case were mutually ignorant of a material existing fact, namely the unavailability of responsible labor in the area of the project, as well as the exhorbitant cost of such labor as was available. As stated in *Walsh*, because of this mutual ignorance, the parties made a contract they would not otherwise have made, and if they had been aware of the actual facts, they would have negotiated and contracted on a different basis.

The plaintiff in the instant case places its main reliance for recovery on our decision in *National Presto Indus., Inc.* v. *United States*, *supra*. In that case the plaintiff and the government entered into a fixed-price contract for the manufacture by the plaintiff of artillery shells for the military. Prior to the signing of the contract, there was some discussion between the parties as to whether or not the shells could be produced by using what was known as the hot cup-cold draw system without the use of turning equipment known as plunge grinders or lathes to shave excess metal from the shells. The plaintiff thought it could not be done, but the government thought it could. However, the plaintiff finally agreed with the government's position, and, when the contract was signed it called for the use of the hot cup-cold draw system without the turning equipment. During performance, the plaintiff encountered difficulty in trying to produce the shells as specified in the contract without the use of turning equipment. Nevertheless, it continued its effort in this regard for a long time, but finally concluded the shells could not be produced without turning equipment. The contractor then used turning lathes and finished the contract. In the meantime, it had incurred a loss of over $700,000 in trying to manufacture the shells in the manner specified in the contract. In due course it filed suit in this court to recover its loss, claiming, among other things, a mutual mistake of fact as

to whether the shells could be produced as specified in the contract, and seeking reformation of the contract so as to require the government to pay for the loss. The court ruled that there was a mutual mistake of fact as to whether the shells could be produced without the turning equipment even though the contract did not mention such equipment, because neither party knew whether or not the shells could be thus manufactured. The court further found that the contract did not put the risk of this mistake on the contractor, and that even if the government had known of the mistake of fact in the beginning, it would have agreed to the contract and would have been willing to pay for part, but not all, of the testing and consequent expenses. The court reformed the contract and required the parties to share the loss.

While the facts are different in *Presto* and the instant case (usually no two cases have the same facts), the facts in the two cases showing mutual mistake of fact justifying reformation of the contracts appear to be substantially the same. In *Presto*, the mutual mistake of fact was that both parties were ignorant as to whether or not the shells could be produced by the hot cup-cold draw system without the use of turning equipment. As it turned out, this could not be done even though the contract required it. In our case, the principal mutual mistake of fact was that both parties were ignorant as to whether or not there was available to the contractor sufficient responsible labor in the area of the project to perform the required work. As it turned out, such labor did not exist.

In *Presto*, we prescribed four tests that must be satisfied before a contract can be reformed because of mutual mistake of fact. These are, in the words of the court, as follows:

> * * * To do justice here we need go no further than formulate and apply a rule for cases of mutual mistake in which the contract, properly construed, allocates the specific risk to neither party—and the side from whom relief is sought received a benefit from the extra work of the type it contemplated obtaining from the contract, and would have been willing, if it had known the true facts from the beginning, to bear a substantial part of

the additional expenses. *Cf. Virginia Engr. Co.* v. *United States*, 101 Ct. Cl. 516, 532–33 (1944). [Footnote omitted.] [*Id.* at 769, 338 F. 2d at 111–12.]

These requirements, as applied to the instant case, are now considered:

(1) There must actually be a mutual mistake of fact by both parties. The existence of a mutual mistake of fact in three areas has been shown above in the instant case and no further discussion of this requirement is deemed necessary.

(2) It must be shown that the contract, properly construed, allocates the specific risk to neither party. The plaintiff says that the contract is silent on this question and for that reason does not place the risk of available responsible labor on either party. The defendant, on the other hand, contends that clauses 5 and 13 of the contract place this risk on the plaintiff. These clauses provided as follows:

> 5. TERMINATION FOR DEFAULT—DAMAGES FOR DELAY—TIME EXTENSIONS
>
> (a) If the Contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in this contract, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the Contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the Government may take over the work and prosecute the same to completion, by contract or otherwise, and may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. Whether or not the Contractor's right to proceed with the work is terminated, he and his sureties shall be liable for any damage to the Government resulting from his refusal or failure to complete the work within the specified time.
>
> * * * * *
>
> (d) The Contractor's right to proceed shall not be so terminated nor the Contractor charged with resulting damage if:
>
> (1) The delay in the completion of the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contrac-

tor, including but not restricted to, acts of God, acts of the public enemy, acts of the Government in either its sovereign or contractual capacity, acts of another contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather, or delays of subcontractors or suppliers arising from unforeseeable causes beyond the control and without the fault or negligence of both the Contractor and such subcontractors or suppliers; and

(2) The Contractor, within 10 days from the beginning of any such delay (unless the Contracting Officer grants a further period of time before the date of final payment under the contract), notifies the Contracting Officer in writing of the causes of delay.

The Contracting Officer shall ascertain the facts and the extent of the delay and extend the time for completing the work when, in his judgment, the findings of fact justify such an extension, and his findings of fact shall be final and conclusive on the parties, subject only to appeal as provided in Clause 6 of these General Provisions.

* * * * *

13. CONDITIONS AFFECTING THE WORK

The Contractor shall be responsible for having taken steps reasonably necessary to ascertain the nature and location of the work, and the general and local conditions which can affect the work or the cost thereof. Any failure by the Contractor to do so will not relieve him from responsibility for successfully performing the work without additional expense to the Government. The Government assumes no responsibility for any understanding or representations concerning conditions made by any of its officers or agents prior to the execution of this contract, unless such understanding or representations by the Government are expressly stated in the contract.

As to clause 5, the argument of the defendant does not appear to be valid. It provides, in effect, that the government cannot terminate the contract nor the contractor charged with the resulting damage if a delay occurs without fault or negligence of the contractor, including strikes. The de-

fendant says that the mention of "strikes" in this paragraph makes the contractor responsible for every irresponsible, arbitrary, and capricious act and misbehavior of labor of every kind and character. This does not appear to be the meaning of clause 5. Considered as a whole, it simply means that if a strike (or other named event) occurs without fault or negligence of the contractor, the government cannot terminate the contract for delay and the contractor will not be liable for delay damages.

Neither does clause 13 put the risk of available responsible labor or of labor misconduct on the contractor. It requires him to make an on-sight inspection to determine conditions of work before bidding. The contractor here did so and consulted with labor leaders and unions and discovered nothing that would indicate in any way that an adequate supply of responsible labor would not be available for the project. The defendant does not contest these facts and in no way charges the contractor with negligence in this regard.

Consequently, it is clear that the contract does not allocate this risk to either party.

(3) The party from whom relief is sought must have received a benefit from the extra work or expense of the other party. In this case, counsel for the government admitted that it did indeed receive a benefit from the extra expense plaintiff had to pay for the irresponsible conduct and misbehavior of labor. It is obvious that this was true.

(4) The party from whom relief is sought (the government here) must be shown to have been willing, if it had known the true facts from the beginning, to bear a substantial part of the additional expenses. This requirement is more difficult than the others because it can only be resolved or satisfied by circumstantial evidence, which was actually what was done in the *Presto* case. In that case, the court concluded that the government would have been willing to bear a substantial part of the additional expenses for labor and delay if it had known the true facts from the beginning, because the government was interested in having the shells produced without turning equipment as provided in the contract. In our case, the government was vitally interested in

having the Soo Lock constructed as provided in the contract. In fact, it was imperative that it be so constructed. The following facts show clearly that the government would have been willing to share in the additional labor and delay costs if it had known the true facts from the beginning. The evidence here that points to such willingness is many times stronger than in the *Presto* case. In fact, it appears that the government would have paid whatever costs that were required to build this lock. This is shown by the following.

The new second lock that the plaintiff contracted to build is located on the St. Mary's River, which connects Lake Superior and Lake Huron. At certain points in the river, the water falls 21 feet from the level of Lake Superior to the level of the lower lakes. The Soo Locks act as a water elevator to permit ships from the other Great Lakes to travel to and from Lake Superior. The evidence shows, as stated by the Comptroller General of the United States in his report to Congress (B–118634, October 19, 1966):

> * * * The locks are important to the nation's economy because about two-thirds of the iron ore produced in the United States and Canada passes through these locks.

Also, the evidence shows that when the Panama and Suez Canals were in operation, more tonnage passed through the Soo Locks than the combined yearly totals of those canals. More than 100 million tons have passed through these locks annually since 1945. See Thomas Manse, *The Soo Locks* (1966).

The existing Soo Locks were inadequate because they were too small to accommodate the larger ships. Also, there was danger that one of the larger ships would collide with and damage one of the gates of the existing locks and block the entire passageway. See Hearings and Reports, House of Representatives, Civil Functions, Department of the Army, 88th Cong., 1st Sess. 19 (1964), at 1983–84, and the report of the Comptroller General to the Congress, *supra*.

This evidence shows that the Soo Locks were vital to the national defense of the country and that it was imperative that the lock covered by plaintiff's contract be built as soon

as possible. It is clear that the interest of the government in producing the artillery shells without turning equipment in *Presto* was minute when compared with its interest in the new Soo Lock. This was so because the shells could always be manufactured with turning lathes, which was the method finally used, but there was no alternate way for ships to pass to and from Lake Superior and the other Great Lakes. If the government could be said to have been willing to share the extra costs in *Presto* if it had known the true facts in the beginning, its willingness to share the additional costs in the instant case under the same circumstances can be said to have been a foregone conclusion.

Another circumstance showing the government would have been willing to share in or pay all of the extra costs if it had known the true facts in the beginning, was the fact that between 1959 and 1963 the Corps of Engineers of the United States Army decided to increase the size of the second new lock involved here and requested an additional $5,800,000 from Congress. The additional money was provided by Congress without any question. See Hearings, *supra*, at 1984 and 1986.

The defendant says that it is speculative to conclude that the government would have been willing to share in the extra expenses in this case if it had known the true facts in the beginning. The easy answer to this argument is that our decision in *Presto* mandates such a conclusion here. Furthermore, the total extra costs here which plaintiff claims as a loss would be as nothing compared to annual appropriations for items of national defense, such as warplanes, tanks, submarines, battleships, and other defense items. Where would our national defense have been if the 85 percent of all iron ore produced in the United States and Canada that is used in making steel for our economy and implements of war had suddenly been denied passage between the Great Lakes because of damage to or inadequacy of the Soo Locks? The situation would have been grim indeed and perhaps catastrophic, and there would have been no doubt that the government would have paid whatever sum of money that was required to provide the necessary Soo Lock involved in this case.

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Accordingly, it appears that every test required by *Presto* for reformation based on mutual mistake of fact has been met by the plaintiff in this case.

The defendant argues that if the contract is reformed in this case, the "floodgates of litigation" will be opened in cases of this kind. This is the same as saying "Pandora's box will be opened." This court answered this argument in *Presto* when it said:

> * * * [W]e need not be stopped short [in reforming a contract for mutual mistake] by the fear of opening Pandora's box. * * * [167 Ct. Cl. at 768–69, 338 F. 2d at 111.]

This court, in the exercise of its equitable powers, is quite capable of keeping cases of this kind in due bounds. A further reference to the decision of the court in *Presto* is appropriate at this point. There the court said:

> * * * We are rightly admonished, in the region of mutual mistake, to seek just solutions. See 3 Corbin, *supra*, § 597 p. 583, esp. fn. 6, § 605, pp. 640–42, esp. fns. 94–95. * * * [167 Ct. Cl. at 768, 338 F. 2d at 111.]

The principle function of this court is to see that justice is done, not only to the government, but also to persons asserting claims against it. Measured by this standard, we see in the instant case a situation where neither party is at fault or guilty of negligence. Neither party accuses the other of any misrepresentation or overreaching. Both parties were ignorant of the fact that responsible labor did not exist in the area of the project. By reason of this fact, extra and additional expenses for labor and delay were incurred. At present, the loss has fallen on the contractor, but he says that the government should at least share in the loss. The question is presented squarely to the conscience of the court sitting as a court of equity. It appears that equity and justice is on the side of the contractor and that the fair, just, and equitable solution to the problem is to require the contractor and the government to share equally in the extra costs resulting from the irresponsible conduct and misbehavior of labor in this case, the exact amount of which will have to be proven by the contractor in a trial in this court. The follow-

ing remarks by the court in the *Presto* case are significant in this regard:

> For such a case it is equitable to reform the contract so that each side bears a share of the unexpected costs, instead of permitting the whole loss to remain with the party on whom it chanced to light. In contract suits courts have generally seemed loath to divide damages, but in this class of case we see no objection other than tradition. Reformation, as the child of equity, can mold its relief to attain any fair result within the broadest perimeter of the charter the parties have established for themselves. Where that arrangement has allocated the risk to neither side, a judicial division is fair and equitable. The division can follow from the special circumstances if there are any; in their absence an equal split would fit the basic postulate that the contract has assigned the risk to neither party. [Footnote omitted.] [167 Ct. Cl. at 769, 338 F. 2d at 112.]

The decision of this court in *R. M. Hollingshead Corp.* v. *United States*, 124 Ct. Cl. 681, 111 F. Supp. 285 (1953), supports the plaintiff's claim in the instant case. There a contract was made for the production of DDT concentrate that would not lose its clear color when stored in metal containers. After the contractor had manufactured the concentrate and stored it in metal containers, it lost its clear color. Later it developed that both the government and the contractor were ignorant of the fact that such concentrate could not be stored in metal containers without a resulting loss of its clear color. In other words, the parties were ignorant of a material existing fact and by reason thereof made a contract that was impossible to perform. The contractor was allowed to recover on his claim of mutual mistake of fact. In our case, the parties were ignorant of a material existing fact which made it impossible for the contract to be performed for the price and within the time agreed upon.

The defendant cites a number of cases, but they are not apposite here because a mutual mistake of a material fact did not exist in any of them. These cases relied on by the defendant are *Flippin Materials Co.* v. *United States*, 160 Ct. Cl. 357, 312 F. 2d 408 (1963); *Olin Mathieson Chemical*

Corp. v. *United States*, 179 Ct. Cl. 368 (1967); *Evans Reamer & Machine Co.* v. *United States*, 181 Ct. Cl. 539, 386 F. 2d 873 (1967), *cert. denied*, 390 U.S. 982 (1968); *Rolin* v. *United States*, 142 Ct. Cl. 73 (1958); *Stafford* v. *United States*, 109 Ct. Cl. 479, 74 F. Supp. 155 (1947); *George A. Fuller Co.* v. *United States*, 105 Ct. Cl. 331 (1946); and *United States* v. *Beuttas*, 324 U.S. 768 (1945).

The *Flippin* case involved a land excavation contract where the government had knowledge of the underground conditions from the beginning and the contractor could have discovered them by examining the government's logs and charts. There was no mutual mistake of fact as to these conditions as claimed by the contractor.

In *Olin Mathieson*, three contracts were involved, one of which required the contractor to supply fuel to the government. The contractor was the expert and had peculiar knowledge regarding the cost of producing fuel, but the government had no such knowledge or expertise. There was no mutual mistake of a material existing fact when the contracts were entered into, and the contractor's claim for increased production costs on that theory was denied.

In *Evans Reamer* the plaintiff was awarded a set-aside portion of a contract to make fire bombs with the clear understanding that ASPR 1–302.4 (rev. 1954) limited the contract price per unit to not more than the price paid for the non set-aside portion, which unit price had been established at $76.036. Later the contractor for the non set-aside portion of the contract applied to the Army Contract Adjustment Board for relief under Title II and the Board raised his price per unit to $87.9391. The set-aside contractor then applied to the Board for the same relief under Title II, but this request was denied by the Board. The contractor then sued in this court seeking reformation of the contract on the ground of mutual mistake of fact. The court correctly held that there was no mutual mistake of facts, because both parties had agreed that the contractor would receive the *award* price of $76.036 established for the non set-aside portion of the contract. Clearly, there was no mutual mistake as to a material existing fact. The case is inapposite here.

In the *Rolin* case the plaintiff entered into a contract to make an impedance measuring line with a base of Ni-Resist metal for the Bureau of Standards. He selected the metal to be used and manufactured the device using his own methods and procedures. He had represented to the government that he was possessed of the necessary knowledge, skill, and expertise to produce this instrument, which according to the record the government apparently did not have. When the device was finished, it was discovered that the base had warped. The plaintiff corrected it, but only after spending considerable time and money doing so. He lost money on the job and sought reimbursement from the government. When his request was denied, he sued here for the extra costs claiming mutual mistake of fact. It was clear that there was no material existing fact about which the parties could have been mutually mistaken. The case has no application to the case before us.

The *Stafford* case is clearly inapposite here. In that case the plaintiff entered into a landscaping contract on a housing project. The government reserved the right to postpone a notice to proceed until the construction job (under a different contract) on the work site was completed. After being awarded the contract, the plaintiff requested the government to delay the notice to proceed for eleven months because he proposed to use non-union labor and he did not want labor trouble with the union employees being used on the construction job. When the notice to proceed was given, the plaintiff found out that his labor and other costs had increased over what they were when he was awarded the contract. He sought to hold the government responsible for this additional cost on the theory of breach of contract. The court denied him recovery on this phase of the case, although he was allowed a recovery for breach of contract on other claims not pertinent here. Mutual mistake of fact and reformation were not even involved in that case, so it has no application here.

Finally, in the *Fuller* and *Beuttas* cases cited by the defendant, the contract contained a provision that if the contractor paid wages in excess of the rates specified in the

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contract, the government would not consider any claims for additional compensation by reason thereof. The contractor did pay excess wages for labor and sought to collect the difference from the government. He was denied recovery. Mutual mistake of fact and reformation were not involved. These cases are not applicable nor controlling in the instant case.

The case before us has been well briefed and argued by able counsel for both parties. However, equity, fairness, and justice requires that the contract be reformed.

I would reform the contract because of mutual mistake of material existing facts, and require the parties to share equally the increased costs resulting from the unavailability of responsible labor in the project area, and remand the case to the trial judge to determine the amount of such costs.

Accordingly, I would deny defendant's motion for summary judgment and grant plaintiff's cross-motion for summary judgment to the extent indicated herein, and remand the case to the trial judge for further proceedings consistent with this opinion.

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509 F. 2d 541

INTERNATIONAL TELEPHONE & TELEGRAPH CORPORATION, ITT DEFENSE COMMUNICATIONS DIVISION v. THE UNITED STATES

[No. 230–72. Decided January 22, 1975]

ON PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

Contracts; default termination; waiver of contract completion date; tender of delivery; preproduction model.—Plaintiff contracted to fabricate and deliver by May 2, 1967, at a fixed price, a preproduction model of an automatic routing line segregator, a highly complex communication unit. The contract gave the Government the option exercisable by a certain date to purchase ten of the items at a stated unit price; this option was not exercised. Although plaintiff experienced performance delays and was not ready to deliver in May 1967, during the following 6-month period defendant made no attempt to terminate the contract for failure to deliver but repeatedly indicated its desire that plaintiff continue to perform. By letter dated Decem-

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ber 12, 1967 defendant sought to establish February 9, 1968 as the new contract delivery date, the letter containing two conditions which plaintiff rejected, i.e. imposition of liquidated damages of $600 a day for additional delay, and reinstatement of the option clause (which had expired). Also, plaintiff did not sign or return an agreement proposed by defendant bilaterally extending the delivery date to February 9, 1968. Acceptance testing began on February 9, but problems developed and the tests were adjourned by mutual agreement. In a letter dated February 15, 1968 containing blanks which plaintiff was requested to fill in with a date (from the remaining days in February) for additional testing, defendant stated that the contract would be terminated for default if the tests were not completed successfully on the selected day. Plaintiff refused to sign the document but defendant nevertheless agreed to send its representatives back on February 19 (a date selected by defendant) to witness resumption of tests. Prior to February 19 plaintiff was notified that defendant reaffirmed its position that February 9, 1968 was the new delivery date and that if the system failed to meet contract specifications during the ensuing tests the contract would be terminated for default. Although the message test failed on February 19, by letter dated February 26 plaintiff informed defendant that test failure was not plaintiff's fault and that most deficiencies in the system had been located or corrected. The contracting officer terminated the contract for default on February 26, 1968 for failure to deliver the system required by the contract. In denying plaintiff's appeal, the ASBCA concluded that February 9, 1968 was not established as a delivery date, that the Government unilaterally established February 19, 1968 as the contract completion date, and that the default termination was proper. Alternatively, the board concluded that even if February 19 was not unilaterally established as the new completion date, defendant still possessed the right to terminate on that date, since plaintiff then tendered delivery and the system did not substantially comply with contract specifications. This case is before the court for Wunderlich Act review of the administrative decision, plaintiff asserting that it is entitled to a termination-or-convenience of the Government. It is *held* (1) that the board correctly found that February 9, 1968 was not established as a delivery date; (2) that the board's determination that February 19 was unilaterally established per defendant's letter of February 15, 1968 as the *specific* contract completion date is incorrect. The letter did not meet the procedural requirement of *DeVito* v. *United States*, 188 Ct. Cl. 979, 413 F. 2d 1147 (1969), for it not only failed to set a specific time or any time thereafter for performance, but it failed to comply with the reasonableness requirement of *DeVito* since defendant knew or should have known that, as of February 15, February 19 was not a reasonable delivery date in view of the complexity of the system, the problems encountered, and

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the record evidence that the parties agreed on February 15 that plaintiff would be allowed to make repairs if needed during the testing period; (3) that under the circumstances, although no production models were required, the standard respecting delivery of a preproduction model enunciated in *Bailey Specialized Buildings, Inc.* v. *United States*, 186 Ct. Cl. 71, 404 F. 2d 355 (1968), applies here, i.e. a preproduction model must first be acceptable to defendant before the contractor can officially tender its delivery, and the only avenue available to defendant to terminate after rejection of a preproduction model is to follow procedure giving plaintiff prior written notice and time to cure; (4) that since defendant had not unilaterally established February 19, 1968 as the new contract completion date, nor had plaintiff officially tendered delivery of the system when it submitted the same for acceptance testing, plaintiff's termination for default was improper, and since the contract contains a termination-for-convenience clause the wrongful default is treated as if plaintiff was terminated for the convenience of the Government. Plaintiff is entitled to recover and judgment is entered granting plaintiff's motion for summary judgment on the issue of liability, defendant's cross-motion is denied, and the case is remanded to the board for calculation of the amount due plaintiff.

Contracts; disputes; administrative findings; material fact established by record not found; duty of Court of Claims to make finding.

[1] Where the administrative board fails to make findings of fact fully supported by the board record and required by that record, this court may make such findings in order to avoid remanding for the purpose of directing the board to arrive at the inescapable finding.

United States ⇐ 73(15)

Contracts; waiver; waiver of delivery time.

[2] Where plaintiff failed to meet the original contract delivery date and estimated a later delivery date (February 9), defendant was willing to agree to that date only if plaintiff reinstated the expired option and agreed to imposition of liquidated damages if delivery were delayed beyond that date, upon plaintiff's refusal to agree defendant issued a proposed amendment to the contract purporting to establish, upon agreement of both parties, February 9 as the new contract delivery date but without the conditions, plaintiff again refused to sign, and acceptance testing began on February 9 but adjourned by mutual agreement pending correction of problems encountered, with defendant agreeing to return to resume testing and plaintiff again refusing to sign the bilateral agreement, since plaintiff neither executed nor returned the agreement, February 9 was not established as a contractual delivery date.

United States ⇐ 72(2)

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Contracts; waiver; breach of contract, waiver of; new delivery date.

[3] After waiver of plaintiff's failure to meet the original delivery date, a letter from defendant requesting plaintiff to insert in the blanks provided therefor a new date (within prescribed 13 days) for final acceptance tests which plaintiff declined to do, does not comply with the establishment of a unilateral contract completion date under the rule enunciated in *DeVito* v. *United States*, 188 Ct. Cl. 979, 413 F. 2d 1147 (1969), i.e. in a waiver after breach situation, time may again become essential and the Government may regain the right to terminate a delinquent contractor for default if (1) the Government unilaterally issues a notice under the contract's default clause establishing a reasonable but specific time for performance on pain of default termination, or (2) the parties bilaterally agree upon a new delivery date.

United States ⇐ 72(2)

Contracts; waiver; breach of contract, waiver of; new delivery date.

[4] In a waiver after breach situation, if the Government unilaterally decides to set a new delivery date, this specific information must be conveyed to the contractor by an appropriate notice. Thus, an agreement that the parties resume testing on a certain date is not a suitable basis for a default termination when the system failed again to meet the contract specifications.

United States ⇐ 72(7)

Contracts; waiver; breach of contract, waiver of; new delivery date.

[5] The unilateral setting of a new delivery date, in a waiver after breach situation, must not only be specific but also reasonable. The standard of reasonableness should be judged from the standpoint of the performance capabilities of the contractor at the time the notice is given.

United States ⇐ 72(2)

Contracts; duress; economic duress; what constitutes.

[6] Pressure, even the threat of considerable financial loss, is not the equivalent of duress. To establish duress it must be shown that one side involuntarily accepted the terms of another, that circumstances permitted no other alternative, and that said circumstances were the result of coercive acts of the opposite party. In order to substantiate the allegation of economic duress or business compulsion, plaintiff must go beyond the mere showing of a reluctance to accept and of financial embarrassment. There must be a showing of acts on the part of defendant which produced these two factors. The assertion of duress must be proven to have been the result of a defendant's conduct and not by plaintiff's necessities.

Contracts ⇐ 95(1)

Contracts; delivery; tender of delivery; acceptance; preproduction model.

[7] A preproduction model must first be acceptable to the Government before the contractor can officially tender delivery of produc-

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tion models. Although no production models were required under the subject contract, defendant was given the option to purchase additional units at the fixed contract price, and had it exercised this option, delivery of the additional units would have commenced after the preproduction model was approved. There is no reason to apply a different standard for delivery in the present case, and thus after defendant rejected the preproduction model, plaintiff should have been given appropriate written notice and time to cure.

United States ⇐ 70(14)

Contracts; termination; default termination; wrongful termination; remedy under contract.

[8] Where a contractor has been improperly terminated for default and the contract contains a termination-for-convenience clause, the wrongful default is treated as if the contractor had been terminated for the convenience of the Government.

United States ⇐ 72(11)

Contracts; termination; default termination; wrongful termination; convenience-of-Government termination; equitable adjustment.

[9] Under the termination-for-convenience clause of a Government contract, the contractor is entitled to an equitable adjustment of the amount due, the adjustment being limited to the total contract price exclusive of anticipated profits.

United States ⇐ 74(5)

Contracts; damages; administrative determination of; necessity for.

[10] Where a contractor has been improperly terminated for default and the court treats the termination as a convenience-of-Government termination, and where the parties have not addressed themselves to the question of the amount of the contractor's recovery on the basis of the termination-for-convenience clause, nor has the board made findings on this question, the court will remand the case to the board for calculation of the amount due the contractor.

United States ⇐ 73(15)

C. Stanley Dees, attorney of record for plaintiff. *Gilbert A. Cuneo*, *Sellers, Conner & Cuneo*, *N. J. Villarosa* and *William C. Wolff*, *International Telephone and Telegraph Corporation*, of counsel.

Lawrence S. Smith, with whom was *Assistant Attorney General Carla A. Hills*, for defendant.

Before SKELTON, MARKEY† and KUNZIG, *Judges*.

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†Chief Judge of the United States Court of Customs and Patent Appeals, sitting by designation pursuant to 28 U.S.C. § 293(a) (1970).

Opinion of the Court

KUNZIG, *Judge*, delivered the opinion of the court:*

This is a contract action wherein this court, by cross motions for summary judgment, has been asked to review a decision of the Armed Services Board of Contract Appeals (the Board)[1] in accordance with the standards of the Wunderlich Act, 41 U.S.C. §§ 321, 322 (1970).

In issue is whether the Board's decision that the Government was entitled to terminate plaintiff's preproduction model contract[2] for default is supported by substantial evidence and is correct as a matter of law.

We hold that plaintiff's contract was terminated for the convenience of the Government and, therefore, reverse the decision of the Board.

In arriving at its decision that termination for default was proper, the Board concluded that the Government had unilaterally established February 19, 1968 as the contract completion date and this date was reasonable under the circumstances. Alternatively, the Board found that the Government had a right to terminate for default on February 19, 1968, irrespective of whether this date had been unilaterally established as the contract completion date, because plaintiff tendered delivery and the system was not in substantial compliance with the specifications.[3]

These conclusions of the Board involve mixed questions of law and fact. We do not deem it necessary to attempt to distinguish the two, since disposition of this case does not require such delineation.

We find the Board's conclusions in favor of the Government insufficient to withstand Wunderlich review. Since we

*We are indebted to Trial Judge Charlotte P. Murphy for her recommended opinion which we have utilized in part, though we have substituted our own in reaching a different result.

[1] ASBCA No. 13385 (September 29, 1971).

[2] For a detailed discussion of preproduction models, *see Astro Science Corp.* v. *United States*, 200 Ct. Cl. 354, 471 F. 2d 624 (1973).

[3] The Board also found that the plaintiff-contractor was not entitled to an additional reasonable period after February 19, 1968 in which to cure nonconformity, since the defects present upon the February 19, 1968 purported delivery were substantial and the plaintiff-contractor had sufficient time between original testing and delivery to correct any deficiencies. Since we find that February 19, 1968 was neither the contract completion date nor the date when delivery of the system was tendered, we need not consider whether plaintiff-contractor was given a reasonable period after that date to cure defects.

find that February 19, 1968 had not been unilaterally established as the new contract completion date nor had plaintiff tendered delivery of the system on that date, we hold plaintiff's termination was for the convenience of the Government and thus remand the suit for administrative finding of the amount due plaintiff.

BACKGROUND

The following are the background facts from which the legal issues arise. They are as found by the Board or are otherwise undisputed.

Plaintiff, ITT Defense Communications Division,[4] entered into a contract with defendant dated May 2, 1966. The contract, executed after competitive negotiations based on a request for proposals, required plaintiff to fabricate and deliver an Automatic Routing Line Segregator (ARLS) for a fixed price of $364,404. The contract called for delivery one year later (May 2, 1967). The General Provisions of the contract included the standard Default and Disputes articles prescribed for fixed-price supply contracts.

The first and only ARLS system required under the contract was described as a preproduction model. About a year later, the system was designated as a prototype and the Government agreed to waive any discrepancies which did not affect the functional integrity of the system. The contract included a clause which provided the Government with an option exercisable by December 30, 1966 to purchase ten production units of the ARLS at a unit price of approximately $115,000. Defendant never exercised this option.

The ARLS was intended automatically to segregate messages in accordance with the desired routing line and was intended to function within a communications center. It was designed to accept paper punched tape containing a message, multiple addressees, and certain other information. After analyzing the tape, the ARLS was to reproduce separate paper punched tapes containing the message for each group of addressees who were to receive the message via a particular routing line. An operator then would take the tape from one

[4] An administrative successor to ITT Federal Laboratories.

of the output locations (21 reperforators) and feed it into the transmitting equipment for a particular routing line.

The ARLS consists of three basic units: (1) Cabinet A with a computer or processor; (2) Cabinet B containing certain peripheral equipment associated with the computers, such as a core memory and two readers, identified as Readers A and B, through which messages would be fed into the system; and (3) seven C cabinets, each containing three reperforators, the devices which punch the new output tapes with addressees segregated by routing lines. The system also contains a printer, similar to a typewriter, which would print out the "header" of the message (the addressee, the security sign, the priority sign, etc.), but not the text of the message itself. While equipment similar to the ARLS had been constructed by plaintiff in the past, this particular system had not been constructed previously. It was especially complex and difficult because of the radio frequency interference (RFI) requirement imposed on the entire system by defendant's specifications.

Plaintiff was not ready to deliver in May 1967, as contractually required, but represented in a June 1967 letter to the contracting officer that October 30, 1967 appeared to be the earliest possible delivery date of the system. The delays plaintiff had encountered, and continued to encounter for several months, were partially due to problems in obtaining suitable cabinets. Although the Government internally discussed the question of delivery dates shortly after the May 2, 1967 contractual delivery date passed, it did not discuss the matter with plaintiff. At the time, the Government still wanted the system, knew of the progress plaintiff had made, *and did not confront plaintiff concerning performance delays.* Apparently, the Government did not consider October 30, 1967 as an actual delivery date. *During the six-month period beginning May 2, 1967, the Government made no attempt to terminate the contract for failure to deliver.*

As early as November 1, 1967, plaintiff's Vice President for Contract Administration, Nicholas J. Villarosa, Jr., represented to the contracting officer that delivery of the system was estimated to occur no earlier than February 9,

1968. A demonstration of the prototype then took place on November 17, 1967. This demonstration was designed to exhibit that the system was at that time able to accept a message, read it in, and, by punching output tapes, achieve routing line segregation. Although one of the readers failed to operate, these basic functions of the system were demonstrated. Defendant's internal reaction to the demonstration was that plaintiff had a long way to go to produce a deliverable system.

On that occasion, the Government learned that in view of increased costs and the fact that the Government's purchase option had lapsed nearly a year before, additional systems would cost $320,000 each, instead of the contractual price of about $115,000 each. This information caused the Government to reevaluate its need for the system. Plaintiff on November 17, 1967 again estimated that delivery would occur on February 9. According to plaintiff's internal progress schedule, in order to meet this estimated delivery date, RFI testing was to be completed by January 5, 1968 and 5 days of acceptance testing was to commence on January 28, 1968. The Government was fully aware of these and other "milestones" in plaintiff's schedule.

During the period from May 2, 1967 through the end of that year, the Government repeatedly indicated its desire that plaintiff continue to perform, even though the contractual delivery date had passed and no firm new date had been set.[5]

By letter dated December 12, 1967, the Government sought to establish February 9, 1968 as the new contract delivery date. This letter, purporting to accept plaintiff's suggestion that February 9, 1968 could become the delivery date, contained two conditions unacceptable to plaintiff: (1) imposition of liquidated damages of $600 a day for additional delay and (2) reinstatement of the option clause to February 29, 1968. The latter condition alone would have resulted in a loss

[5] For example, in an internal Government memorandum of December 26, 1967 [App. Exh. 11], it was stated that "[w]e have agreed to a series of delays since May on the thesis that the final system would meet our specifications and yield a production run of systems that would provide a cost-effective solution to our operational problems."

of more than $200,000 per unit, or over two million dollars, to plaintiff.[6] Plaintiff rejected the proposal.

In its December 26 and January 23 monthly reports, plaintiff stated that the system's delivery was still anticipated as of February 9, 1968. An internal log entry of the Government's Contract Administration and Settlement Branch dated January 5, 1968, revealed that:

> It was decided that an amendment extending the final delivery date of the item under the Contract to on or about 9 Feb. 68 would be issued by CAS to give the government a firm legal foundation on which to place itself for a termination for cause position. Such an amendment, *bilateral in nature*, is being sent ITT. [emphasis added]

Defendant proceeded to forward a proposed bilateral agreement[7] setting February 9, 1968 as the date for final delivery. *Plaintiff did not sign or return the proposed agreement.* On February 9, 1968, acceptance testing commenced but came to a halt when the system would not accept the expected number of routing instructions for individual addressees. Another problem observed by the Government during the test was that Reader B would not properly read input tape.[8]

The tests were adjourned on February 9 by mutual agreement pending location and cure of the problems encountered, with defendant's representatives agreeing to return to resume testing. *Prior to adjournment, plaintiff again refused to sign the proposed bilateral agreement in view of the test failure.*

Since plaintiff neither executed nor returned this twice-offered agreement, the Board correctly found that February 9, 1968 was not established as a delivery date. Plaintiff felt that the proposed bilateral agreement was an attempt by defendant to establish a basis for terminating plaintiff for default.

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[6] The Government sought to reinstate the lapsed option clause to buy 10 more ARLS at the fixed contract price, on the ground that the option could not be exercised unless and until there had been a demonstration and approval of the prototype. This approach, however, was contrary to the terms of the contract, which provided for exercise of the option by December 30, 1966, a date over four months in advance of the original contractual delivery date of May 2, 1967.

[7] Proposed Amendment No. 2, dated January 8, 1968.

[8] On February 15, 1968, this reader was returned to the manufacturer for repairs after it was learned that the repair work could not be accomplished at plaintiff's plant.

Also, since plaintiff had encountered further slippages related to RFI testing during January and had witnessed the Government's suspension of February 9 testing, plaintiff no longer considered February 9 to be a reasonable delivery date.

According to Mr. Villarosa's uncontradicted testimony, when defendant's representatives did not appear for the resumption of testing on February 13, 1968, plaintiff inquired and learned that a termination decision had been reached. Plaintiff then requested a meeting with defendant's representatives on February 15, 1968, in order to prevent termination for default.[9] In pursuing this effort to avert termination for default, Mr. Villarosa informed the Government in a letter dated February 14, 1968 that the system was operating in accordance with specification requirements and was ready for shipment, even though the system hadn't worked on February 9, 1968.

At a meeting with defendant's representatives on February 15, 1968, Mr. Villarosa questioned the Government's desire for the system and requested resumption of the testing. With an awareness of the Government's termination decision, he again said that the system was ready for delivery. Defendant's representatives then handed plaintiff's representatives a letter dated February 15, 1968, containing blank spaces which plaintiff was requested to fill in with a date, selected from any of the thirteen days remaining in February. The letter stated that the contract would be terminated for default if the tests were not completed successfully on the selected day and that the Government's view was that February 9, 1968 had become the new contractual delivery date. *Mr. Villarosa refused to sign the document, but defendant nevertheless agreed to send its representatives back on Feb-*

[9] While the Board omitted findings of fact covering the February 13, 1968 events and the purpose of the February 15, 1968 meeting, the evidence is undisputed as to these facts. Since there is substantial evidence to support them, they have been supplied. There is sufficient precedent to the effect that where the Board fails to make findings of fact fully supported by the Board record and required by that record, this court may make such findings in order to avoid remanding for the purpose of directing the Board to arrive at the inescapable finding. *Liles Constr. Co.* v. *United States*, 197 Ct. Cl. 164, 455 F. 2d 527 (1972); *Foster Const. C. A.* v. *United States*, 193 Ct. Cl. 587, 600, 435 F. 2d 873, 879–80 (1970); *Maxwell Dynamometer Co.* v. *United States*, 181 Ct. Cl. 607, 631, 386 F. 2d 855, 870 (1967).

ruary 19, 1968 (a date selected by the Government) to witness resumption of tests.

Prior to the resumption of testing on February 19, plaintiff was handed a letter dated February 16, 1968, which reaffirmed the Government's position that February 9, 1968 had become the new delivery date and stated that if the system failed to meet the contract specifications during the ensuing tests, there would be a termination for default pursuant to the contract.

The Government learned on February 19, 1968 that Reader B was still in the repair shop, two of the reperforators were not operational, and manual "patches" were present in the system's programming materials. Notwithstanding these problems, the tests proceeded. Plaintiff's program manager still felt that defendant's requirements could be met. Difficulties developed in the system during the introduction of test messages and the tests were again terminated on February 19, 1968.

Plaintiff, by letter dated February 26, 1968, stated that the failure of the message test was not due to any fault on its part and that most deficiencies in the system had been located or corrected. However, before this information reached the Government representatives, the contracting officer on February 26, 1968 terminated the contract for default for failure to deliver the system required by the contract.[10] As of the termination date, nearly nine months after the original contractual delivery date, plaintiff had expended in excess of $700,000.

Plaintiff timely appealed from the final decision of the contracting officer terminating the contract for default. The Board on September 29, 1971 concluded that the termination for default was proper and denied plaintiff's appeal. In its petition filed May 31, 1972, plaintiff brought this action under the general jurisdiction of this court, 28 U.S.C. § 1491 (1970), for review of the administrative decision under both sections of the Wunderlich Act, 41 U.S.C. §§ 321, 322 (1970).

[10] Plaintiff first learned of the termination decision by telephone on February 23, 1968.

UNILATERAL ESTABLISHMENT OF CONTRACT COMPLETION DATE

Plaintiff contends that the Board erred in finding February 19, 1968 had been established unilaterally as the new contract completion date. Defendant, on the other hand, argues that the Board's determination should be accorded finality by this court.

We hold plaintiff's position to be correct.

Even though the Board properly refused to find that February 9, 1968 ever became an enforceable contract delivery date, it nevertheless gratuitously concluded that February 19, 1968 was established as the new contract delivery date. It was the Board's opinion that the Government's letter of February 15, 1968 served as a *unilateral* notice establishing a point in time at which the contractor would be considered in default if the system failed to comply with the contract performance requirements.

The Board felt that, although plaintiff had declined to fill in the blanks of the February 15 letter, "the Government representatives in effect did so by informing appellant [plaintiff] that they would return for further testing on 19 February."

According to the Board, the letter was not drafted as a contract amendment and was only bilateral with regard to the fact that the Government requested plaintiff to insert a February date for final acceptance tests. The Board also felt that plaintiff's signature was intended only to represent acknowledgement of receipt and understanding of the contents, but not necessarily agreement.

While the Board concluded that the Government unilaterally established February 19, 1968 as the contract completion date in accordance with *DeVito* v. *United States*, 188 Ct. Cl. 979, 413 F. 2d 1147 (1969), this conclusion is erroneous. Plaintiff correctly contends that the only action taken at the meeting of February 15, 1968, was the agreement that the Government would resume testing on February 19, 1968. It seems clear that the February 15 letter, containing blanks instead of specific dates, did not comply with *DeVito*.

Under the *DeVito* rule, in a waiver after breach situation, time may again become essential and the Government may

regain the right to terminate a delinquent contractor for default, if (1) the Government unilaterally issues a notice under the contract's Default clause establishing a reasonable but specific time for performance on pain of default termination, or (2) the parties bilaterally agree upon a new delivery date. *DeVito*, *supra*, at 991–92, 413 F. 2d at 1154. In order to reestablish a contractual delivery date, the Government must "* * * agree with plaintiff on a new delivery schedule or give the plaintiff notice of a new delivery schedule which would be reasonable as to time." *Bailey Specialized Buildings, Inc.* v. *United States*, 186 Ct. Cl. 71, 79, 404 F. 2d 355, 359 (1968).

A. Specific

In *DeVito*, the court specifically set out the procedure which the Government must follow unilaterally to establish a new delivery date and stated:

> * * * The proper way thereafter for time to again become of the essence is for the *Government to issue a notice under the Default clause setting a reasonable but specific time for performance* on pain of default termination. * * * The notice must set a new time for performance that is both reasonable and specific from the standpoint of the performance capabilities of the contractor at the time the notice is given. [Emphasis supplied] (*DeVito*, *supra* at 991–92, 413 F. 2d at 1154).

At another point in its opinion, the court said that the unilateral notice must "* * * *clearly set a new schedule.*" [emphasis supplied]. *De Vito*, *supra* at 992, 413 F. 2d at 1155.

The letter of February 15, 1968 containing a blank space for a final test date in February did not meet these procedural requirements, for not only did this letter fail to set a specific time for performance, but also it failed to set any time for performance. According to *DeVito*, if the Government unilaterally decides to set a new delivery date, this specific information must be conveyed to the contractor by an appropriate notice. No such notice was ever received by plaintiff in the instant case.

In this connection, the similarities between the instant case and *Bailey Specialized Buildings, Inc.* v. *United States*,

supra, are pertinent. In *Bailey*, subsequent to the contractual delivery date, the Government accepted the plaintiff's proposed revised schedule which listed a date when a preproduction model would be available for inspection and later dates when the contract items would be delivered. *Bailey*, *supra* at 76–77, 404 F. 2d at 358. Finding various defects to exist on the inspection date, the Government proceeded prior to the first revised delivery date to terminate the contractor for default. The court held that the termination was improper, since the mutually agreed upon revised schedule had only set a particular date as the date when the model would be available for inspection, and there was no requirement that it be delivered without defects on that occasion. *Bailey*, *supra* at 81, 404 F. 2d at 359–60.

Although the parties in the instant case had not contractually agreed that February 19 would serve as a date when acceptance testing would resume, they did agree to resume the tests on that date. Since default terminations must be strictly construed, *DeVito*, *supra*, at 990, 413 F. 2d at 1153, it is concluded that just as the language "available for inspection" in *Bailey* was not considered to establish a date upon which a default termination for failure to deliver the contractual item could be based, the agreement in the instant case that the parties resume testing on February 19 should also not be regarded a suitable basis for a default termination.

Plaintiff also correctly points out that the Government's own conduct is inconsistent with the Board's finding that the Government established February 19 as the contract delivery date. Throughout the administrative proceedings, it was the Government's position that February 9 was the new delivery date. Both the letters of February 15 and February 16 contained language that the letters were not an extension of the delivery date of February 9, 1968. As plaintiff suggests, it does not appear that the Government at any time treated February 19, 1968 as the new delivery date.

For all the previously enumerated reasons, it is concluded that the Board's determination that February 19, 1968 was

unilaterally established as the *specific* contract completion date is incorrect.

B. *Reasonable*

The Board also found that February 19, 1968 was a reasonable contract completion date under the circumstances existing on February 15, 1968, because plaintiff had represented on February 14 and 15 that the system was ready for delivery. This finding was based on plaintiff's failure to object on February 15 to the resumption of tests on February 19. The Board indicated that plaintiff's inaction implied acceptance of the alleged unilateral selection by the Government of February 19 as the new contract completion date.

This court has said that the unilateral setting of a new delivery date must not only be specific but also *reasonable*. The standard of reasonableness should be judged from the standpoint of the performance capabilities of the contractor at the time the notice is given. *DeVito*, *supra*, at 991–92, 413 F. 2d at 1154.

The Board's finding placed substantial reliance on the contents of plaintiff's letter of February 14 and statement of February 15 that the system was acceptable and ready for delivery as evidence that the February 19 date was a reasonable contract completion date.

While plaintiff does not deny that it made the above representations, it asserts that both these and earlier representations regarding the potential February 9 delivery date were based on its knowledge of the Government's desire subsequent to November 17, 1967 to terminate plaintiff for default.[11] The Board in its decision recognized that the Gov-

[11] Plaintiff also asserts that its February 14 and 15 representations should be viewed in the context of the fact that it learned on February 13 that a termination notice had been issued. Plaintiff calls attention to the fact that it had spent over $700,000 to produce an item priced at about $360,000 and had worked nine months beyond the original contract delivery date. Plaintiff submits that the Board unduly relied on these representations and that plaintiff was acting under duress when it made the representations.

In support of its assertion that it is duress for the Government to threaten to terminate a contractor for default when it does not possess the right, plaintiff cites *Universal Sportswear, Inc.* v. *United States*, 145 Ct. Cl. 209, 180 F. Supp. 391 (1959), in which the court found that duress existed where a contractor, under a threat of default termination, signed a contract amendment requiring changes without monetary compensation, and *Urban Plumbing*

ernment's termination motivation was a result of its learning that the contract purchase option at a fixed price per unit could not be exercised, thus reducing the requirement for the ARLS system due to lack of funds to procure additional systems. Not only does the record indicate that the Government internally considered the termination idea, but it also contains strong evidence that this idea was made apparent to plaintiff. The letter of December 12, 1967 and the events surrounding the Government's efforts to get plaintiff to execute the proposed bilateral agreement containing a reinstatement of the option clause well illustrate this point.

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and Heating Co. v. *United States*, 187 Ct. Cl. 15, 408 F. 2d 382 (1969), *cert. denied*, 398 U.S. 958 (1970), in which the court voided a contract amendment signed by the contractor under a threat of default termination, since the Government did not possess the right to terminate at the time the plaintiff signed, for the performance delay was in fact caused by the Government. Although plaintiff concedes the factual dissimilarities between these cases and the instant case, it still maintains that since it was acting under duress when it made the representations, they should not be used as the sole justification for a conclusion that February 19 was a reasonable date, for these statements logically followed plaintiff's becoming aware that the Government had prepared a default notice.

Clearly, plaintiff was under a great deal of pressure in the weeks subsequent to November 17, 1967 and this pressure must have intensified after its conversations with the Government on February 13, 1968. However, pressure, even the threat of considerable financial loss, is not the equivalent of duress. *DuPuy* v. *United States*, 67 Ct. Cl. 348, 381 (1929), *cert. denied* 281 U.S. 739 (1930); *Adler Const. Co.* v. *United States*, 191 Ct. Cl. 607, 423 F. 2d 1362 (1970). The elements necessary for duress have been stated by this court in *Fruhauf Southwest Garment Co.* v. *United States*, 126 Ct. Cl. 51, 62, 111 F. Supp. 945, 951 (1953):

"[T]hree elements are common to all situations where duress has been found to exist. These are: (1) that one side involuntarily accepted the terms of another; (2) that circumstances permitted no other alternative; and (3) that said circumstances were the result of coercive acts of the opposite party. . . . In order to substantiate the allegation of economic duress or business compulsion, the plaintiff must go beyond the mere showing of a reluctance to accept and of financial embarrassment. There must be a showing of acts on the part of the defendant which produced these two factors. The assertion of duress must be proven to have been the result of defendant's conduct and not by the plaintiff's necessities. . . . [citations omitted]."

Plaintiff learned by a voluntary inquiry on February 13 that a default decision had been reached. There is nothing in the record that the Government on that occasion threatened to terminate plaintiff for default, the situation existing in both cases cited by plaintiff. In the instant case, plaintiff was informed of the existing state of affairs, i.e., that defendant considered February 9 as the valid contract delivery date and since the tests conducted on that date were unsuccessful, the Government had decided to terminate plaintiff for default. Therefore, the elements of duress were not satisfied. *However, plaintiff's representations, although perhaps a matter of choice, were certainly influenced by the knowledge it received on February 13 and the attendant pressures.*

Plaintiff contends that, contrary to the Board's conclusion, the *DeVito* reasonableness requirement was not met since the Government knew or should have known that, as of February 15, February 19 was not a reasonable delivery date. This contention has merit. Exactly what the Government learned or could have learned of plaintiff's prospective performance capabilities as a result of the February 9 tests and through the February 15 meeting is material in evaluating this contention, irrespective of plaintiff's self-serving statements to avoid default.

At the February 9 tests, the Government witnessed that only about 300 of the contemplated 600 routing indicators could be read into the ARLS system and no test messages were run. Plaintiff at that time was unable to determine whether the difficulty was one with the hardware or the software. During the February 9 testing, Reader B could not properly read the input tape. On February 15, this reader was returned to the manufacturer for repairs, since the work could not be accomplished at plaintiff's plant. In view of the known circumstances, it was not reasonable for the Government to expect that Reader B would definitely be in operable condition on February 19, only ten days after its malfunction. Certainly, plaintiff could not deliver a complete system while one of the readers was being repaired. Based on this and other problems which existed on February 9 and were observed by the Government representatives, it was not reasonable for the Government to expect that all of these problems would be corrected within 10 days.

Our conclusion that, as of February 15, February 19 was not a reasonable delivery date is further supported by evidence contained in the record before the Board showing plaintiff's refusal to agree on February 15 to a firm and final February delivery date. After plaintiff refused to fill in the blanks in the February 15 letter, plaintiff asked the Government to return and resume testing. The Government admittedly proposed February 19 as a suitable date, which plaintiff proceeded to accept. However, by agreeing to this date but otherwise remaining silent, the contractor was not acknowledging that February 19 had become the absolute

or final contract delivery date. When plaintiff refused to sign the February 15 letter, it clearly indicated that it did not consider any date in February as a reasonable contract delivery date. Consequently, it is illogical to conclude, as the Board apparently did, that, by agreeing to resume testing on February 19, plaintiff was suddenly accepting a date four days away as such a firm date.

Additionally, in view of the contract provisions, the agreement to resume testing on February 19, a mere four days away, should not have been considered an agreement by plaintiff to the Government's desire that testing be completed, on penalty of default, in February. The contract provided that testing might last up to 40 hours, even though the test plan might ideally have been completed in 6 to 8 hours.[12] Presumably, in recognition of the complexity of the project, the parties agreed in the contract that testing might last up to 40 hours.

The record reveals that on February 15, the contractor sought to avoid the very result which occurred on February 19—that the testing would cease without giving plaintiff the opportunity to make repairs. The Government's project engineer, the only Government witness who testified regarding this matter, said that he assured the contractor that the Government would not act in an arbitrary way on February 19. The record supports a finding that some provision for repairs was also agreed upon at the February 15 meeting.[13]

The Government argues that the test results on February 19 were so bad that it was clear that the system was deficient and that further testing should not continue. This

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[12] 3200 ACCEPTANCE TEST

After the requirements of paragraph 3300 [RFI Requirements] have been met and when the contractor feels that the system is ready for delivery to the Government, an acceptance test shall be run at the contractor's facility. This test shall not exceed forty hours of running time. Within this forty hours, the Government representatives shall be allowed to perform any test necessary to verify compliance with this specification (except those tests which would cause hardware damage to the system and providing such tests were not meant to test the system's design to protect itself from damage).

[13] For the same reasons stated in note 9 *supra*, this court has made these findings of fact omitted by the Board. *Liles Constr. Co.* v. *United States*, *supra*; *Foster Const. C. A.* v. *United States*, *supra*; *Maxwell Dynamometer Co.* v. *United States*, *supra*.

point does not obviate the Government's unreasonableness since (1) the contract, recognizing the complexity of the project, contemplated up to 40 hours of test, while plaintiff was only allowed one testing session, and (2) the record indicates that the parties agreed on February 15 that plaintiff would be allowed to make some kind of repairs if needed during the testing period.[14]

Because the Government knew or should have known that a date only four days after an unsuccessful test was not reasonable under the circumstances and because we do not believe the Government could reasonably rely on plaintiff's self-serving statements made to avoid a pending default termination, particularly in light of plaintiff's refusal to agree to a new completion date, it is concluded that the Board's finding that February 19, 1968 was unilaterally established as a reasonable contract completion date under the circumstances is incorrect.

TENDER OF DELIVERY

Plaintiff contends that the Board erred in construing its submission of the ARLS system for testing on February 19, 1968 as a tender of delivery to the Government. It asserts that the Board failed to recognize that plaintiff's representations were made under duress, i.e., the threat of default termina-

[14] The Government maintains that it had no alternative but to select unilaterally a delivery date since the contractor refused to agree upon its own projected February 9 delivery date and then further refused to select another delivery date even after it had represented on February 14 and 15 that the system was ready for delivery. Defendant also says that the contractor sought to prevent the establishment of a new delivery date and thereby require the Government to test and retest the system until it complied with specifications.

If we carry the Government's argument to its logical conclusion, this court would be required to modify our holding in the *DeVito* case to except reasonableness as a criteria if a showing of bad faith can be made against plaintiff. While such a modification may be justified in some other factual situation, the present case does not mandate such a result.

As noted *supra*, the Board found the Government's termination motivation to be in part based on its awareness that budgetary restraints now rendered employment of the ARLS system economically unfeasible given the fact the fixed price option clause had expired. It would therefore seem clear that if bad faith was exhibited in the above case, neither party was lacking in participation. Moreover, our decision does not preclude the Government from unilaterally selecting a new delivery date. It only reaffirms our prior holdings that unilateral selection of a new contract completion date must be properly implemented, i.e., both specific and reasonable.

tion. Defendant argues that the Board was correct in finding that delivery was tendered and that this finding was consistent with the Board's prior decision in *Phil Rich Fan Manufacturing Co., Inc.*, ASBCA No. 12770, 71-1 BCA par. 8694 (1971).

We agree with plaintiff, although not for the reason it asserted.

The Board found, as an alternative basis for its decision, that even if February 19, 1968 was not unilaterally established by the Government as the new contract completion date, defendant still possessed the right to terminate on that date, since plaintiff then tendered delivery and the system did not substantially comply with the contract specifications.

The Board seems to have reasoned that since plaintiff represented on February 14 and 15 that the system was ready for acceptance testing, the failure of the system to meet the test standards constituted the "delivery of a nonconforming product." Given this fact, the Board found that the Government possessed, under *Radiation Technology, Inc.* v. *United States*, 177 Ct. Cl. 227, 366 F. 2d 1003 (1966) and *Phil Rich Fan*, *supra*, the right to terminate plaintiff for default.

The error in this conclusion is the failure of the Board to consider the fact that the ARLS system was a *preproduction model* and that the agreement at issue was a *preproduction model* contract. This fact renders both *Radiation Technology* and *Phil Rich Fan* inapplicable.

Unlike a situation requiring delivery of supplies (*Phil Rich Fan*) or previously existing products (*Radiation Technology*), a preproduction model must first be acceptable to the Government before the contractor can officially tender delivery of production models. *Bailey Specialized Buildings, Inc.* v. *United States*, 186 Ct. Cl. 71, 404 F. 2d 355 (1968). One reason for requiring acceptance before delivery is that acceptance of a preproduction model triggers the delivery schedule for production models. In many instances, the preproduction model, after acceptance, becomes the first production model and its delivery is then required subsequent to Government approval of the acceptance testing. *See Bailey Specialized Buildings, Inc., supra; Astro Science Corp.* v. *United States*, 200 Ct. Cl. 354, 471 F. 2d 624 (1973).

Even though no production models were required under this contract, we find no reason to apply a different standard for delivery in the present case. As noted earlier, when plaintiff contracted to construct the ARLS system, the Government was given the option to purchase additional units at the fixed contract price. Had the Government exercised this option, delivery of the additional systems would have commenced after the preproduction model was approved. Under the circumstances, this preproduction model would likely have become the first production model. As such, acceptance would be a condition precedent to official delivery. The fact that no production models were included under this contract fails to alter the *Bailey* rationale.

Both the contract language itself and the conduct of the parties during the February testing period lend support to this conclusion. There is little doubt that the Government desired to terminate the contract for default when testing was resumed on February 19. In addition, plaintiff repeatedly refused to agree to a new contract completion date. At the time plaintiff and the Government resumed testing of the ARLS system, neither side gave any indication that it considered the submission of the system to be tantamount to delivery. Moreover, the relevant clause in this particular contract (set out in full in footnote 12) is supportive of our conclusion that delivery could not possibly take place prior to the completion of testing. This clause defines what plaintiff is required to do:

> [W]hen the contractor feels that the system is ready for delivery to the Government, an acceptance test shall be run at the contractor's facility.

It can certainly be easily interpreted from this language, particularly in light of the conduct of the parties, that acceptance testing must be completed and the preproduction model approved before the contractor is required to tender delivery to the Government.[15]

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[15] Our interpretation is supported by *Bailey Specialized Buildings, Inc. v. United States*, 186 Ct. Cl. 71, 404 F. 2d 355 (1968). In *Bailey*, a case also dealing with acceptance and delivery of a preproduction model, we stated:

"All that plaintiff was required to do on that date [acceptance testing] was to submit the preproduction tower to defendant for inspection. The plaintiff complied with this obligation. No production tower was required to be

The *Bailey* court specifically stated what the Government must do in order to terminate a preproduction contract based on rejection of the model during acceptance testing. If, based on rejection, the Government decided that termination for default was in order, the contractor was required to be given *written notice* of the decision to terminate ten days in advance of termination, and the contractor was to be permitted to cure defects within the ten-day time span. Had the *Bailey* court viewed submission of a preproduction model for testing to be tantamount to tender of delivery, there would have been no need to recite the above procedure.

Since plaintiff was neither given such written notice, nor permitted to cure defects, it would seem that the Government raised the delivery question because of its failure to follow proper procedures after rejecting the ARLS system. If a showing had been made that this system was urgently needed by the Government and plaintiff was aware of this need, this failure might have been excusable. Under such circumstances, the Government's failure to follow strictly the default termination procedures might not be fatal. But since it is clear that after November 17, 1967, the Government had no intention to deploy the ARLS system because of its increased cost, no justification can be shown that "time was of the essence" in completing the contract. Given the noncritical nature of the timing sequence, no excuse can be made for the Government's failure to follow proper procedures in its default attempts.

Based on the above discussion, we conclude that a preproduction model must first be acceptable to the Government before the contractor can officially tender its delivery. The proper avenue available to the Government to terminate for

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delivered until . . . after defendant accepted the preproduction model. The defendant terminated the contract without ever having accepted the preproduction model. We think plaintiff did everything it was required to do by the new schedule, although its model was not approved."
Id. at 81, 404 F. 2d at 360.

It should be noted that the *Bailey* court reached its conclusion even though in *Bailey* a new future delivery schedule had been agreed to, bilaterally, after the Government had waived the original contract delivery schedule. How much stronger, then, is the instant situation when plaintiff repeatedly refused to agree to a new delivery date. By acquiescing to the February 19 testing date, all plaintiff did was submit the ARLS system for resumption of acceptance testing. To construe this action as an implied agreement to tender delivery is in clear violation of plaintiff's demonstrated intention.

default after rejection of a preproduction model is to follow procedures giving plaintiff prior written notice and time to cure. The Board's finding that delivery had been tendered is therefore held to be erroneous.

* * * * *

Since the Government had not unilaterally established February 19, 1968, as the new contract completion date, nor had the plaintiff-contractor officially tendered delivery of the system when it submitted the ARLS for acceptance testing, we find that plaintiff's termination for default was improper.

This court has repeatedly stated the remedy available under the contract when a contractor has been improperly terminated for default. Provided the contract contains a termination for convenience clause, the wrongful default is treated as if the contractor had been terminated for the convenience of the Government. *See John Reiner & Co.* v. *United States*, 163 Ct. Cl. 381, 325 F. 2d 438 (1963), *cert. denied*, 377 U.S. 931 (1964). The contract in issue contains such a clause.

Under the convenience clause, the contractor is entitled to an equitable adjustment of the amount due. This adjustment is limited to the total contract price. At oral argument, counsel for plaintiff suggested that if we find the contractor had been terminated for convenience of the Government, this court should render judgment for the full contract price. Plaintiff offers this as an alternative to remanding the case back to the Board for a calculation of the amount due. The basis of plaintiff's suggestion is that the contract had been substantially completed, the plaintiff had expended more than twice the original contract price in developing the ARLS and remanding to the Board would unnecessarily prolong the case.

We reject plaintiff's suggestion.

If judgment were based on the contract price, this court would be giving plaintiff its anticipated profit for the contract. However, we have already held in *Manloading & Management Assoc., Inc.* v. *United States*, 198 Ct. Cl. 628, 461 F. 2d 1299 (1972), that in contracts which contain a termination for convenience clause, recovery must be calculated in accordance with that clause and should not include anticipated profits.

Syllabus

Since the parties have not addressed themselves to the question of what plaintiff is entitled to recover on the basis of the termination for convenience clause, and since the Board also failed to make any such finding, it is necessary to remand this case to the Board for calculation of the amount due.

We hold that plaintiff is entitled to recover and judgment is entered granting its motion for summary judgment on the issue of liability. Pursuant to Rule 149 of this court, further action in this court will be suspended for six months from this date to allow the parties to return to the Armed Services Board of Contract Appeals for calculation of the amount to which plaintiff would have been entitled if its contract had been terminated for convenience. Pursuant to Rule 149(f) and upon conclusion of the proceedings of the Board, the plaintiff will report the result to the court and the parties will take further action for the final disposition of the case in this court. [See Rule 150] Defendant's cross motion for summary judgment is denied.

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509 F. 2d 1150

ALBERT H. CARTER v. THE UNITED STATES

[No. 127–66. Decided January 22, 1975]*

ON THE PROOFS

Military pay; discharge; validity of discharge; "show cause" proceeding.—Plaintiff enlisted in the military service in the 40's and received a commission in the Air Force Reserve in 1955, his evaluation reports indicating an excellent service record and outstanding airmanship qualities. However, in April 1960 he was notified that he was being recommended for involuntary release with an honorable or general discharge based on financial irresponsibility charges of a non-criminal nature. In September 1960 a formal Board of Inquiry recommended plaintiff for a discharge under other than honorable conditions, with forfeiture of readjustment pay, etc., which action was reviewed and endorsed by the Air Force chain of command. Immediately thereafter plaintiff was involuntarily committed to psychiatric wards until his December 29, 1960

*See opinion of the court dated June 18, 1975 (207 Ct. Cl. ——, —— F. 2d ——) on plaintiff's motion for rehearing and defendant's motion for rehearing to alter and amend judgment.

Syllabus

discharge, the commitment precluding his full participation in the review process. In the medical proceedings it was found that plaintiff suffered from a "severe character disorder" which satisfied the specification of then 32 C.F.R. § 44.7(g)(2); this specification is an approved ground for an honorable or general discharge for unsuitability. In civilian life various financial and other problems of a criminal nature beset plaintiff. Following unsuccessful administrative proceedings to have his discharge corrected, plaintiff brought suit here, specifying numerous errors and issues including statutory, regulatory and constitutional due process violations by the Air Force. The regulation under which plaintiff was given the stigma-type discharge was AFR 36–2 which shifts the burden of proof to the accused in a proceeding which includes jeopardy of an undesirable, dishonorable or less than honorable discharge, and which does not attempt to specify separate procedures based on the critical differences between 10 U.S.C. § 1163 (reserve officers) and 10 U.S.C. §§ 8781–86 and 8791–97 (regular officers). For the reasons set forth, it is *held* that AFR 36–2 as applied to plaintiff, was beyond the statutory authority of the Air Force, and that plaintiff's discharge was unlawful and must be corrected under Pub. L. 92–415 to show that he was discharged either with honor (honorable discharge), or under honorable conditions (general discharge), effective the same date, for unsuitability due to a "severe character disorder," pursuant to the medical board findings, plaintiff's own admissions in his pleadings before this court, and 32 C.F.R. § 44.7(g)(2), the type of discharge whether honorable or general being left to the Air Force to determine. It is also *held* that plaintiff is entitled to the various monetary benefits normally provided reserve officers separated with his rank and longevity. In reaching its decision, the court has concluded that the normal rule for constructive active duty credit is inapplicable under the circumstances of this case. The Secretary of the Air Force is directed to correct the discharge of plaintiff pursuant to Rule 147(c) and Pub. L. 92–415 consistent with the opinion. The case is remanded to the trial division for determination of damages due plaintiff.

Military pay; discharge; validity of discharge; regulation of Executive Department; compliance with necessary.

[1] In view of the damaging implications of a less-than-honorable discharge, judicial review must focus with scrupulous care upon severance from the armed services with such an administrative discharge. Applicable statutes and regulations, and therefore the fundamentals comprising due process, must be honored both in letter and spirit.

Armed Services ⟸ 11

Syllabus

Military pay; discharge; undesirable discharge; validity of discharge; reserve v. regular officers; "show cause" proceeding.

[2] Where plaintiff, an Air Force reserve officer, was given an administrative undesirable discharge under AFR 36–2 which shifts the burden of proof to the accused in this type of discharge proceeding, and where 10 U.S.C. § 1163 applying to discharge of *reserve* officers is silent as to authority to conduct a proceeding in which the accused bears the burden of showing cause why he should not be separated, the Air Force in applying AFR 36–2 to plaintiff exceeded its statutory authority.

Armed Services ⟸ 11

Evidence; burden of proof; power of legislature.

[3] The legislature cannot declare an individual guilty or presumptively guilty of a crime, or place on him the burden of going forward with the evidence.

Constitutional Law ⟸ 57

Military pay; active duty pay; discharge; wrongful or invalid; recovery, measure of.

[4] Normally, the rule with this court has been that if a stigma-type discharge is determined to have been illegal, it is held ineffective to terminate credit for active duty also, even though active duty is not performed, and full back pay is awarded until the termination of enlistment in case of an enlisted person, or until the service is lawfully terminated in case of an officer. Excluded from the damages is pay based on anticipated re-enlistments and promotions, as well as time spent in civilian or military criminal confinement.

Armed Services ⟸ 13.1(15)

Military pay; active duty pay; discharge, wrongful or invalid; recovery, measure of; constructive active duty credit.

[5] In determining the applicability of "constructive active duty credit" in back pay computation where plaintiff's stigma-type discharge has been found illegal, consideration must be given to (1) this court's power to "correct" a military record under Pub. L. 92–415 which includes the power to substitute one kind of discharge for another, as of the same date, (2) erecting for plaintiff a period of "constructive active duty" would not be to his advantage or be equitable to him because under the specific authority of 10 U.S.C. §§ 1161 and 1163, he would become exposed to a discharge under conditions other than honorable as soon as his civil conviction became final, and (3) plaintiff cannot receive back pay for periods when he was psychiatrically disabled, since he was not ready, willing and able to perform his duties.

Armed Services ⟸ 13.1(15)

Military pay; discharge; undesirable discharge; "show cause" proceeding; Air Force reserve officer.

[6] Where, at the time of the subject discharge proceeding, the Air Force standards apparently differed as to psychiatric unfitness for duty from those governing criminal responsibility and ability to aid in one's defense at a trial, there was no inconsistency in the administrative finding of plaintiff's unfitness for duty by reason of severe character disorders and yet exposing him to the "show cause" proceeding based on alleged misconduct.

Armed Services ⊜ 11

Military pay; discharge; reserve officers; commission.

[7] Reservists do not have a "property right" in their commissions. Under 10 U.S.C. § 1162 they may be discharged at the pleasure of the President, except so far as other provisions of law limit his actions.

Armed Services ⊜ 11

Albert H. Carter, pro se.

Leslie H. Wiesenfelder, with whom was *Assistant Attorney General Carla A. Hills*, for defendant.

Before DAVIS, NICHOLS, and KASHIWA, *Judges*.

NICHOLS, *Judge*, delivered the opinion of the court:

This suit for backpay and to correct a wrongful discharge is brought pursuant to 28 U.S.C. § 1491 (as amended August 29, 1972 by Pub. L. 92–415, § 1, 86 Stat. 652). The case is now before the court for review of the opinion and findings of Trial Judge White. Though greatly aided by his opinion and findings of fact, we reach a different result from the one he recommended.

Recently, October 21, 1974, the plaintiff filed a motion alleging indigency and requesting the assignment of counsel to represent him. Counsel are a great help to the court in pay cases, and in respect to a claimant acting *pro se*, much extra work is thrown on the judges. In this case, the extra work had practically all been done, including trial, the trial judge's report, and briefing of the parties' exceptions. Plaintiff flooded the court with pleadings, motions, and briefs, prepared by himself with great diligence and ingenuity, but not calculated to make our task easier. The motion is denied as coming too late. We believe the denial is harmless to plain-

tiff in view of the favorable result we reach without aid of counsel.

I

The essential facts of this case are that Captain Albert H. Carter enlisted in the National Guard, September 16, 1947, and in the Air Force in 1948. He rose through the ranks to qualify for OCS (Officer Candidate School) and a commission in the Air Force Reserve in 1953, and was, prior to his transfer to Turner AFB, Georgia, rated successively higher in each evaluation report, obtaining for the period August 1958 to August 1959, two fitness reports that effectively described him as one of a half dozen best bombadier-navigators in the United States Air Force. Captain Carter was described as an extremely brilliant, dynamic and proficient officer, eminently promotable and highly recommended for various aircrew-instructor positions.

To the extent if at all that Captain Carter's financial problems had caused the Air Force any problems prior to his assignment to Turner AFB, the Air Force was apparently willing to overlook them or minimize them in view of his obviously outstanding airmanship qualities.

However, at Turner Air Force Base, his new commanders recommended his separation from the Air Force. He was "grounded" on April 21, 1960, and was notified that he was being recommended for release from the Air Force involuntarily, the endorsements of the Strategic Air Command Generals Harris and Griswold indicating that an honorable or general discharge was appropriate, based on the non-criminal nature of the financial-irresponsibility charges (and probably also upon his excellent service record and various decorations, in keeping with a long-held service policy currently expressed in 32 C.F.R. § 41.5(d)). The troubles originated in a series of curious transactions with suppliers of goods and services to plaintiff, in the civilian economy. They need not be described in detail. They led to complaints against plaintiff by his creditors to the Air Force.

These troubles led to others, as Captain Carter was one of those unfortunates who, when thwarted and angry, are

unable to refrain from abusive language against all those who stand in their way.

The recommendation to release Captain Carter led to a formal Board of Inquiry under AFR 36–2, on September 28–30, 1960, at which Captain Carter was required to "show cause" why he should not be separated from the Air Force. The Board recommended Captain Carter for a discharge under other than honorable conditions, with forfeiture of readjustment pay, on the grounds that he had "demonstrated financial-irresponsibility," "had failed to demonstrate acceptable qualities of leadership required of his grade," "had made false official statements," and "had conducted himself in a manner incompatible with exemplary standards of personal conduct."

The record also indicates that the sudden reversal of personal fortunes was associated with and perhaps caused by a psychological impairment in Captain Carter so that, almost immediately after his Board of Inquiry on September 28–30, 1960, Captain Carter was involuntarily committed to a series of mental wards and hospitals, remaining almost continually confined in military facilities until his December 29, 1960, discharge date, and thereafter in civilian facilities until some unknown time after April 6, 1961.

The outcome of the Board's actions, as reviewed by the Air Force chain of command, was that Captain Carter received a discharge under other than honorable conditions with forfeitures of readjustment pay, accumulated leave, and certain other separation benefits in place of the general or honorable discharge originally recommended, even though his presence in psychiatric wards effectively precluded his full participation in the review process.

In course of his troubles with the military, others beset him in the civilian world. He was charged with passing a bad check on Sears Roebuck and Co., on August 8, 1960. In his efforts to exculpate himself from this he committed other acts leading to a conviction in a United States District Court for forgery and perjury. He made an insanity defense which the jury rejected. The Fifth Circuit staged an *en banc* hearing to consider whether the instructions to the jury, which had been on old-fashioned *McNaughton* principles, were unduly

favorable to the prosecution. The result was affirmance by an evenly divided court. *Carter* v. *United States*, 325 F. 2d 697 (1963). The defense would have had the circuit follow or at least approach *Durham* v. *United States*, 94 U.S. App. D.C. 228, 214 F. 2d 862 (1954). Presumably counsel believed that under the *Durham* rule Captain Carter would have been acquitted as insane. As it was, he served his time pursuant to sentence.

II

Subsequent to his discharge, Captain Carter has had numerous other problems. Defendant reports that he is now serving a term as an habitual offender in Texas. He has tried unsuccessfully to get his discharge corrected administratively. Eventually he brought suit in this court, specifying in excess of 40 separate errors and issues in regard to his Air Force undesirable discharge. Many of the alleged errors specify statutory, regulatory, and constitutional due process violations by the Air Force.

As a consequence this court referred the case to the trial division under an order that sought to concentrate the trial division's efforts on three issues: (1) improper command influence; (2) the failure to observe proper evidentiary standards (*see*, *Glidden* v. *United States*, 185 Ct. Cl. 515 (1968)); and (3) competency of Captain Carter for trial and his eligibility for a disability discharge. Unfortunately, the trial judge's findings have failed to resolve these issues for the court. We have come to believe the basis exists for our decision on broader grounds.

III

The case is best approached by taking up first the most vulnerable aspect, legally, of the Air Force's proceedings respecting Captain Carter, the type of discharge awarded. It was one of those which inflict a stigma on the recipient. The Air Force has been reporting to would-be employers of Captain Carter that:

> * * * Captain Carter failed to pay just debts when due; generated disputes with creditors to avoid payment of just debts; and made false official statements regarding

> payment of debts. For these reasons * * * [Captain Carter was discharged] under other than honorable conditions. (Letter of December 29, 1961, from J. M. Herich, Air Force Section, to L. D. Wickter, Addressograph-Multigraph Corp., Houston, Texas).

Such consequences, with the loss of severance pay and other normal benefits demand

> * * * that judicial review focus with scrupulous care upon severance from the armed services with a less-than-honorable administrative discharge. Applicable regulations, and therefore the fundamentals comprising due process, must be honored both in letter and spirit. [*Conn* v. *United States*, 180 Ct. Cl. 120, 127, 376 F. 2d 878, 881 (1967).]

It should go without saying, applicable statutes must be honored too. The regulation under which the plaintiff was given the discharge he was given, AFR 36–2, shifts the burden of proof to the accused in an undesirable, dishonorable, or less-than-honorable discharge proceeding.

AFR 36–2 cites various statutory bases, with no attempt to specify separate procedures based on the critical differences between 10 U.S.C. § 1163 (reserve officers) and 10 U.S.C. §§ 8781–86 and 8791–97 (regular officers). These statutes deal with procedures in getting rid of unsatisfactory officers.

The reserve officer provision, 10 U.S.C. § 1163, dates from 1952 and nowhere in the original statute or its legislative history (U.S. Code Cong. & Ad. News, 82d Cong., 2d Sess. (1952), at 2040–41) is there a hint of authority to conduct a proceeding in which the defendant bears the burden of proof. If a Board so recommends, an officer can be discharged under this provision, with a stigma-type discharge, 10 U.S.C. § 1163(c)(1), without a court-martial or civilian court conviction.

The regular officer provisions, 10 U.S.C. §§ 8781–86 and 8791–97, which would have applied to Captain Carter had he been a regular officer instead of a reserve officer, date from 1960. Their language and legislative history (U.S. Code Cong. & Ad. News, 86th Cong., 2d Sess. (1960), at 2872–73 and 2880–85) allow for the burden to be cast upon the defendant in a "show cause" proceeding in which there is an

honorable or general ("under honorable conditions") discharge awarded. Retirement is authorized for those eligible, and severance pay for others.

AFR 36–2 calls for a single administrative procedure, blithely ignoring the statutory differences. Captain Carter was allowed to suffer a combination of the worst of both procedures: exposure to undesirable discharge ("other than honorable conditions") (AFR 36–2 § 4), and the burden of proof to show cause why he should not be discharged. (AFR 36–2 § 16). This burden on him was no mere form of words. It is stressed in the "Guidance Manual" supplied to members of the Board.

The Defense Department regulations (24 Fed. Reg. 1704, March 7, 1959) also failed to authorize the provisions of AFR 36–2. AFR 36–2, as applied to Captain Carter, was beyond the statutory authority of the Air Force. There is no reason to suppose that Congress (with its traditional concern for the rights of servicemen) meant to authorize use of a "show cause" procedure against a reserve officer who was thereby placed in jeopardy of a stigma-type discharge.

Our opinion does not raise any question concerning the use of the "show cause" procedure in any case—as with regular officers—where there is no exposure to a stigma-type discharge, or to discharge of reservists, with stigma, if guilt is proved in an administrative procedure that recognizes and observes the usual due process safeguards for the accused.

If the statute were construed to authorize the combination here involved, a constitutional problem would arise. The legislature cannot declare an individual guilty or presumptively guilty of a crime, or place on him the burden of going forward with the evidence. *Speiser* v. *Randall*, 357 U.S. 513, 523–24 (1958). Following this principle in *Shaw* v. *United States*, 174 Ct. Cl. 899, 357 F. 2d 949 (1966), we held that the Navy could not convict a finance officer of embezzlement on proof of a shortage in his funds which he failed to explain. In *Clackum* v. *United States*, 148 Ct. Cl. 404, 296 F. 2d 226 (1960), we held that the Air Force could not inflict a stigma-type discharge on a service woman without a fair, open procedure.

Our interpretation of the statutes avoids these constitutional problems. It follows that the discharge was unlawful and must be corrected under Pub. L. 92-415, *supra*, with pecuniary consequences in remission of the forfeiture of severance or readjustment pay and any other monetary perquisites plaintiff lost by reason of the Board recommendations.

IV

Normally, the rule with us has been that if a stigma-type discharge is determined to have been illegal, it is held ineffective to terminate credit for active duty also, even though active duty is not performed, and full backpay is awarded until the termination of enlistment in case of an enlisted person (*Glidden* v. *United States*, *supra*, *O'Callahan* v. *United States*, 196 Ct. Cl. 556, 451 F. 2d 1390 (1971); *Clackum* v. *United States*, *supra*,) or until the service is lawfully terminated, in case of an officer. *Borys* v. *United States*, 201 Ct. Cl. 597, *cert. denied*, 414 U.S. 1001 (1973); *Gearinger* v. *United States*, 188 Ct. Cl. 512, 412 F. 2d 862 (1969). Excluded from the damages are pay based on anticipated re-enlistments and promotions.

It would, also, be necessary to exclude from any backpay computation time spent in civilian or military criminal confinement, *Borys*, *supra*, and time spent in absence without leave is not compensable. *Switkes* v. *United States*, 202 Ct. Cl. 162, 480 F. 2d 844 (1973). In *Gearinger*, *supra*, however, we held that a mere probability that an officer's active duty would have been terminated at some date later than the void discharge and before the court's judgment does not suffice to cut short the period in which credit is earned for constructive active duty. Defendant there was speculating about the possibility that the officer would have been passed over for promotion by selection boards, with discharge the consequence. The court's refusal to speculate about promotions is concomitant to its refusal to speculate about failure to promote. It is unavoidable that the "constructive" active duty career fashioned by the court for calculation of damage lacks realism to some degree, but it is hard on both sides in turn and is not utterly devoid of realism.

The term "constructive active duty credit" is used in *Kirby* v. *United States*, 201 Ct. Cl. 527, 535 (1973), *cert. denied*, 417 U.S. 919 (1974), to identify the credit of pay for services not actually performed, that we are talking about.

We think that the normal rule for "constructive active duty credit" is inapplicable here for various reasons. In the first place, our new power to "correct" a military record under Pub. L. 92–415, *supra*, includes the power to substitute one kind of discharge for another, as of the same date. We are not confined as before to simply voiding an illegal discharge.

Secondly, erecting for plaintiff a period of "constructive active duty" would not be to plaintiff's advantage or be equitable to him because under the specific authority of 10 U.S.C. §§ 1161 and 1163, he would become exposed to a discharge under conditions other than honorable as soon as his civil conviction became final.

Third, plaintiff cannot receive backpay for periods when he was psychiatrically disabled. *Manzi* v. *United States*, 198 Ct. Cl. 489, 493 (1972). A lengthy psychiatric examination at Eglin Air Force Base resulted in findings by the primary psychiatrist who treated Captain Carter, a Captain Brennan, that Captain Carter was suffering from a "very severe character disorder" and should be separated. This finding was approved by other consulting psychiatrists (Lt. Col. Brown and Captain Small) who together with Captain Brennan formed the required Board of Officers under 10 U.S.C. § 1163. Acting as a Board, they determined that Captain Carter was not "physically disabled under the provisions of AFM 35–4" but did recommend "that action be taken for his separation from the service under the appropriate administrative regulation". This conclusion was approved by the chief medical officer, Lt. Col. Sorensen, and forwarded to Captain Carter's commander for action along with his Board of Inquiry proceedings.

In regard to these medical proceedings, we note that 10 U.S.C. § 1163 was complied with insofar as a Board of Officers is required. Captain Brennan's specific finding of a "severe character disorder" satisfies the specifications of then

32 C.F.R. § 44.7(g)(2), (24 Fed. Reg. 1704, March 7, 1959). This specification is an approved ground for an honorable or general ("under honorable conditions") discharge for unsuitability (32 C.F.R. § 44.7(g)(2), now 32 C.F.R. § 41.6(g)(2)).

All of the above proceedings took place contemporaneously with the review of the Board of Inquiry, the medical certificate for the psychiatric evaluation being forwarded to Captain Carter's commander about November 29, 1960. Thus, had the Air Force chosen to act solely upon this certificate, instead of the misconduct charges, Captain Carter would still have been discharged about the same time as he was.

The disability was also admitted by Captain Carter in his pleadings, using the medical findings to support his claim that he was not competent to stand trial before the Board of Inquiry.

The medical records were part of the overall record and thus did receive some high level review, although no one can now say how much.

Thus in reconstructing what would have happened if the Board of Inquiry had not met, we conclude that Captain Carter would have been discharged on about the same date as he was—with an honorable or general ("under honorable conditions") discharge. This is quite unlike the mere speculation about future career adversities that we rejected in *Gearinger*.

In light of Captain Carter's mental disability at the pertinent period, as officially determined and as asserted by himself in his petition, and in light of his recurrent troubles with the civilian law, including convictions and prolonged confinement in prison, any fabrication of a "constructive active duty credit" for him becomes an exercise in absurdity which we are unwilling to perform ourselves or to direct the trial division to perform. If a "constructive active duty credit" were used as a starting point for damage computation, it would be subject to downward adjustment to the extent plaintiff was not at any time "ready, willing and able to perform the duties of the position * * *." *Manzi*, *supra*, at 493; *Graves* v. *United States*, 176 Ct. Cl. 68 (1966). Obviously he was not ready or able at the beginning of the "constructive active duty" period, being in confinement, and it

would require a powerful imagination indeed to suppose the Air Force would have kept plaintiff's commission ready for him to exercise on, *e.g.*, one of his releases from prison. In such circumstances, as in *Graves*, *supra*, reference to the trial division for Rule 131(c) proceedings is not required.

It should be noted that apparently the Air Force standards differed as to psychiatric unfitness for duty, from those governing criminal responsibility and ability to aid in one's defense at a trial. There was, therefore, no inconsistency in finding him unfit for duty, yet fully exposed to the "show cause" proceedings based on his alleged misconduct.

The cut-off of "constructive active duty credit" when it would rest on absurd premises, is not new with this case. In *Denton* v. *United States*, 204 Ct. Cl. 188 (1974), we recently held that a reservist officer, illegally discharged during World War II, could not recover backpay, except during a short time in the demobilization period after V–J day, and not to the date of presumptive retirement or the date of judgment. It would have been unrealistic and a mere bonanza for the plaintiff in face of the wholesale discharges of reservists on demobilization after World War II. Reservists do not have a "property right" in their commissions. They may be discharged at the "pleasure of the President", 10 U.S.C. § 1162, except so far as other provisions of law limit his actions. In *Denton* we speculated that the case of a regular might be different. It will not be necessary to decide this until the case of a regular is before us.

Therefore we hold that Captain Carter's discharge of December 29, 1960, must be corrected to show that he was discharged either "with honor" (honorable discharge) or "under honorable conditions" (general discharge), effective the same date, for "unsuitability" due to a "severe character disorder", pursuant to the medical board findings, Captain Carter's own admissions in his pleadings before this court, and 32 C.F.R. § 44.7(g)(2), 24 Fed. Reg. 1704, March 7, 1959. Whether the corrected discharge is "honorable" or "general", we leave to the United States Air Force to determine.

We further hold that Captain Carter is entitled to all severance and separation pay and allowances and other benefits, normally provided reserve officers separated with his rank

and longevity, including but not limited to readjustment pay, payment for accumulated leave, and travel pay to home of record for serviceman and dependents (at time of discharge).

Accordingly, on considering the recommended decision and findings of Trial Judge White, and the exceptions of the parties thereto, and their briefs and oral arguments, judgment is entered for the plaintiff to the extent indicated in this opinion. The Secretary of the Air Force is directed to correct the discharge of Captain Albert H. Carter, pursuant to Rule 147(c) of the rules of this court (Pub. L. 92–415, 86 Stat. 652), consistent with this opinion. The case is remanded to the trial division of this court pursuant to Rule 131(c)(2) for a determination of damages due plaintiff, based on the corrected discharge.

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509 F. 2d 1157

RICHARD G. AUGENBLICK v. THE UNITED STATES

[No. 357–64. Decided January 22, 1975]*

ON PLAINTIFF'S MOTION FOR LEAVE TO FILE A SECOND AMENDED PETITION AND FOR RELIEF FROM JUDGMENT, AND ON DEFENDANT'S MOTION TO LIFT THE STAY OF PROCEEDINGS AND TO DENY FURTHER RELIEF

Military pay; court-martial; Uniform Code of Military Justice; lesser-included offense; notice of offense; service-connected.—Following reversal by the Supreme Court on January 14, 1969, 393 U.S. 348, of this court's decision invalidating plaintiff's court-martial conviction and his Navy discharge, plaintiff's motion for leave to file a first amended petition was denied and the court ordered the previous judgment vacated and withdrawn and the petition dismissed. Thereafter, plaintiff filed a motion for leave to file a second amended petition and to set aside said order in view of the ruling in *O'Callahan* v. *Parker*, 395 U.S. 258 (June 2, 1969), claiming that plaintiff's offense was not service-connected, that the court-martial was therefore without jurisdiction, and that Article 134 of the Uniform Code of Military Justice under which he was convicted by the court-martial was invalidly applied in his case. This court ordered that plaintiff's said motion be held in abeyance pending Supreme Court action in pending certiorari petitions on the issue of retroactivity of *O'Callahan*, and the validity of Article 134. On June 25, 1973 the

*Plaintiff filed a *petition for certiorari* on May 20, 1975.

Syllabus

Supreme Court determined the retroactivity question (*Gosa* v. *Mayden*, 413 U.S. 665), and on June 19, 1974 (*Parker* v. *Levy*, 417 U.S. 733) and on July 8, 1974 (*Secretary of the Navy* v. *Avrech*, 418 U.S. 676) sustained the validity of Article 134. It is *held* that *Gosa, supra,* determines authoritatively that the Constitution does not require that the *O'Callahan* rule be applied to court-martial convictions occurring prior to its decided date, and that a majority of the Supreme Court upheld the legal proposition that *O'Callahan* should not control cases like the present one. The majority of the panel, through Judges Laramore and Nichols, *holds*, in addition, that plaintiff's offense, involving servicemen in a deviant sexual act, was "service connected" and that therefore *O'Callahan* would be inapplicable even if it were to be applied retroactively. Judge Davis expresses no opinion on the issue of service-connection. It is also *held* that, although the original charge against plaintiff was solely sodomy under Article 125, the invocation of Article 134 at the close of testimony as a lesser-included offense was proper, and that the accused had sufficient notice that the offense of indecent, lewd and lascivious conduct under Article 134 was implicated. Plaintiff's motion for leave to file a second amended petition and for relief from judgment is denied, defendant's motion to lift the stay of proceedings and to deny further relief is granted; the order of April 4, 1968 dismissing the petition goes into effect in 30 days.

Military pay; court-martial jurisdiction; offenses; effect of reversal or overruling of previous decisions; retroactivity.

[1] The Constitution does not require that the rule enunciated in *O'Callahan* v. *Parker*, 395 U.S. 258 (June 2, 1969), i.e. that a crime, to be under military jurisdition, must be service-connected, be applied to court-martial convictions occurring prior to June 2, 1969.

Courts ⇐ 100(1)

Military pay; court-martial jurisdiction; Uniform Code of Military Justice; offenses; lesser-included offenses.

[2] Military law recognizes the notion of lesser-included offenses, and the rights of the law officer to instruct on them (even over defense counsel's objection).

Armed Services ⇐ 47(6)

Constitutional law; due process of law—Fifth Amendment; Uniform Code of Military Justice; notice of offense.

[3] Article 134 of the Uniform Code of Military Justice is not unconstitutionally vague under the due process clause of the Fifth Amendment where the accused has fair notice that his conduct is punishable under that provision, nor is the article facially invalid because of overbreadth (*Parker* v. *Levy*, 417 U.S. 733 (1974), and *Secretary of the Navy* v. *Avrech*, 418 U.S. 676 (1974)). Where plaintiff, a former Navy commander, was originally charged under Article 125 of the UCMJ with sodomy, at the close of testimony the law officer instructed the court-martial that commission of an in-

decent, lewd and lascivious act in violation of Article 134 was a lesser-included offense which they could also find under the testimony, and the court then found plaintiff not guilty of sodomy, but guilty under Article 134, since plaintiff could not reasonably have any doubt that the acts found by the court-martial were indecent, lewd and lascivious and that such acts fall within Article 134, plaintiff was given sufficient notice that the invocation of Article 134 as a lesser-included offense could and might well be implicated.

Armed Services ⇐ 47(2)

Military pay; courts-martial; Court of Claims jurisdiction to review.

[4] Once this court has determined that the constitutionally required due notice has been given to an accused that he was punishable for the offense of indecent, lewd and lascivious conduct under Article 134, the problem of whether lewd conduct under Article 134 is technically a lesser-included offense under Article 125 no longer rises to the constitutional plane but is, rather, a non-constitutional issue of military law with which the civilian courts cannot normally deal if the military tribunals have fairly considered the problem, pursuant to the finality language of 10 U.S.C. §876.

Armed Services ⇐ 47.1(2)

Military pay; discharge; Uniform Code of Military Justice; offenses; lesser-included offense.

[5] Under the acts and circumstances of this case, the Court of Military Appeals was within bounds in determining that the Article 134 offense—indecent, lewd and lascivious conduct—is embodied in the Article 125 crime of sodomy.

Armed Services ⇐ 47(2)

Joseph H. Sharlitt, attorney of record, for plaintiff. *Neal E. Krucoff* and *Lemuel R. Green*, of counsel.

Bruno A. Ristau, with whom was *Assistant Attorney General Carla A. Hills*, for defendant.

Before LARAMORE, *Senior Judge*, DAVIS and NICHOLS, *Judges*.

DAVIS, *Judge*, delivered the opinion of the court:

Our decision in 180 Ct. Cl. 131, 377 F. 2d 586 (1967), invalidating plaintiff's court-martial conviction and dismissal from the Navy, was reversed by the Supreme Court, 393 U.S. 348 (January 14, 1969). On the coming down of that Court's mandate, plaintiff immediately filed here a motion for leave to file a first amended petition. Believing that this proposed amendment raised issues, which, if open to judicial scrutiny

should have been presented earlier, or merely stated or restated positions which had been rejected by the high court or were required by its decision to be refused, we denied (on April 4, 1969), 187 Ct. Cl. 727, the motion for leave to file the first amended petition, and ordered that our previous judgment be vacated and withdrawn and that the petition be dismissed.[1]

On July 14, 1969, plaintiff moved for leave to file a second amended petition and also to set aside our order of April 4, 1969. That motion and the proffered amendment invoked the Supreme Court's intervening ruling in *O'Callahan* v. *Parker*, 395 U.S. 258 (decided June 2, 1969); claiming that Augenblick's offense was not service-connected, plaintiff now asserted that the court-martial was without jurisdiction on that ground. The motion and the amendment also alleged, as a separate basis, that the general article, Article 134, 10 U.S.C. § 934, of the Uniform Code of Military Justice—under which Augenblick was convicted by the court-martial—was invalidly applied to his case. On August 20, 1969, plaintiff also moved for a stay of our order of April 4, 1969. Defendant opposed both applications.

At that time, there were pending before the Supreme Court, or about to be filed, certiorari petitions presenting the issue of the retroactivity of *O'Callahan*. On October 31, 1969, this court ordered that plaintiff's motion for leave to file his second amended petition be held in abeyance pending the Supreme Court's action on those certiorari petitions.[2] That Court did not reach and determine the retroactivity question until it decided *Gosa* v. *Mayden*, 413 U.S. 665, on June 25, 1973, and we suspended ruling in the present case during that period, although we received some further briefing and argument.[3]

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[1] Plaintiff sought certiorari from this decision; that petition is still pending in the Supreme Court since the parties agreed that it should await our decision on the second amended petition. 43 U.S.L.W. 3037 (U.S. Aug. 13, 1974).

[2] In the same order we granted a stay of our order of April 4, 1969 (denying the motion for leave to file the first amended petition) until thirty days after our action on the motion for leave to file the second amended petition.

[3] After *Relford* v. *Commandant*, 401 U.S. 355 (1971), was decided without reaching *O'Callahan's* retroactivity, defendant moved here to lift the stay order of October 31, 1969 (*see* note 2, *supra*). That motion has not been acted upon and is still pending.

Even after *Gosa* v. *Mayden*, the constitutionality of Article 134 still remained an open question, and since that issue was then before the Supreme Court we held this case still further, awaiting an authoritative ruling on that point. The Supreme Court sustained the validity of Article 134 in *Parker* v. *Levy*, 417 U.S. 733 (1974) and *Secretary of the Navy* v. *Avrech*, 418 U.S. 676 (1974).

It is now at last appropriate and necessary to act on plaintiff's request to add to his petition the two new issues of the retroactivity of *O'Callahan* and of the validity of the application to his case of Article 134.[4] Defendant urges that, in any event, plaintiff's efforts to raise those questions came too late, but we need not and do not reach that argument since we are persuaded that, on their merits, the two points are foreclosed by the Supreme Court's recent rulings.

I

We think it clear that *Gosa* v. *Mayden*, 413 U.S. 665 (1973), determines authoritatively that the Constitution does not require that the *O'Callahan* rule be applied to court-martial convictions occurring prior to June 2, 1969 (the date *O'Callahan* was decided). Though there was no opinion for the Court, the Court's judgment, taken together with the opinions of Mr. Justice Blackmun (for himself and three other Justices)[5] and Mr. Justice Rehnquist,[6] necessarily add up to that result. The decision was not ad hoc to the *Gosa* case alone. Five justices having voted on general grounds that the *O'Callahan* rule should not be applied to pre-*O'Callahan* cases, the Court was able to render a decision which, unlike a four-to-four affirmance, creates a binding precedent controlling the lower courts in comparable cases. It is immaterial that less than a majority of the Court upheld the legal proposition that *O'Callahan* should not be applied retroactively; the important thing is that a majority voted that *O'Callahan*

[4] We had already received briefs on the bearing of *Gosa* v. *Mayden*, and the Article 134 issue. We have also had the benefit of oral argument and some further briefing after *Levy* and *Avrech*.

[5] Holding that *O'Callahan* should not be applied retroactively. 413 U.S. at 685.

[6] Holding that *O'Callahan*, even if required to be applied retroactively if valid, should not be followed but should be overruled because wrongly decided. 413 U.S. at 692.

should not control cases like the present one. *Cf. Glidden Co.* v. *Zdanok*, 370 U.S. 530 (1962); *National Mutual Ins. Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582 (1949).

Plaintiff urges that Mr. Justice Blackmun's opinion would allow retroactivity if it could be shown that the fact-finding in a specific case was particularly unreliable "in direct consequence of a generic disability within military justice" (plaintiff's words),[7] but we do not read the opinion that way. It ends its discussion of the point by saying flatly and without qualification (413 U.S. at 685: "We conclude that the purpose to be served by *O'Callahan*, the reliance on the law as it stood before that decision, and the effect of a holding of retroactivity, all require that *O'Callahan* be accorded prospective application only. We so hold [footnote omitted]." The ruling was across the board.

Gosa v. *Mayden* is sufficient to dispose of plaintiff's claim that he is entitled to the coverage of *O'Callahan* v. *Parker*. The majority of this court, through Judges Laramore and Nichols, holds, in addition, that Augenblick's offense, involving two servicemen in a deviant sexual act, was "service-connected," and therefore that *O'Callahan* would be inapplicable even if it were to be applied retroactively. Judge Davis would not consider this point, since it is unnecessary to do so, and expresses no opinion on the issue of service-connection.

II

In *Parker* v. *Levy*, *supra*, and *Secretary of the Navy* v. *Avrech*, *supra*, the Supreme Court held that Article 134 of the Uniform Code of Military Justice, 10 U.S.C. § 934 (the so-called "General Article"), is not unconstitutionally vague under the Due Process Clause of the Fifth Amendment where the accused has fair notice that his conduct is punishable under that provision, nor is the article facially invalid because of overbreadth. 417 U.S. at 757–758; 418 U.S. at 676–678.

Plaintiff denies that these rulings control his case since, unlike Levy and Avrech, he was not initially charged with a violation of Article 134, but that section of the Code came

[7] Plaintiff asserts that is true in this case and in other military cases of sexual deviation. Brief of Plaintiff at 8–12 (filed Sept. 18, 1973).

into his trial only after all the evidence had been submitted. The original charge against Augenblick was solely sodomy under Article 125; at the close of the testimony the law officer instructed the court-martial that commission of an "indecent, lewd and lascivious" act in violation of Article 134 was a lesser-included offense which they could also find under the testimony.[8] The court then found Augenblick not guilty of sodomy (under Article 125) but guilty (under Article 134) of committing an indecent, lewd and lascivious act by wilfully and knowingly placing his head in the enlisted man's lap with his face in close proximity to the latter's exposed privates. *See* 180 Ct. Cl. at 139, 377 F. 2d at 590–91. The question before us is whether this posture of the case compels or permits a disposition other than those in *Levy* and *Avrech*.

At the very least, those decisions of the high court demonstrate that plaintiff could not have complained of vagueness if he had been initially charged with an indecent, lewd and lascivious act under Article 134, and the proof had been the same as here in the actual trial. Augenblick could not reasonably have had any doubt that (a) the acts found by the court-martial were indecent, lewd, and lascivious, and (b) indecent, lewd and lascivious acts fell within Article 134. The former goes without saying and needs no elaboration. As for the latter, Appendix 6 of the 1951 Manual for Courts-Martial set forth (at p. 492) under Article 134 a form specification for an indecent, lewd and lascivious act with another (as well

[8] The law officer instructed as follows:

"If you are satisfied by legal and competent evidence before you beyond a reasonable doubt only, one, that at the time and place alleged and in the manner indicated by the evidence the accused wrongfully committed an indecent, lewd and lascivious act with James O. Hodges, Jr., airman third class, United States Air Force but which act fell short of sodomy; and, two, that under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the Armed Forces or was of the nature to bring discredit upon the Armed Forces, then you may, by exceptions and substitutions to the charge and specification, find the accused guilty of an indecent, lewd and lascivious act as violation of Article 134 of the Code. You will notice that he is charged with a violation of 125 of the Code."

Military law recognizes the notion of lesser-included offenses, and the right of the law officer to instruct on them (even over defense counsel's objection). *See* Art. 79, U.C.M.J., 10 U.S.C. § 879; Manual for Courts-Martial (1951 ed.), pp. 303–04; *United States* v. *Floyd*, 2 U.S.C.M.A. 183, 188, 7 C.M.R. 59, (1953); *United States* v. *Wilson*, 7 U.S.C.M.A., 713, 715, 716–17, 23 C.M.R. 177 (1957); *United States* v. *Bairos*, 18 U.S.C.M.A. 15, 17, 39 C.M.R. 15 (1968).

as related offenses such as indecent acts with a child, and indecent exposure, at p. 491).

The problem thus narrows to the invocation of Article 134 at the close of the case as a lesser-included offense. Plaintiff says he was deprived of due process because he was not on notice that Article 134 might be invoked in that fashion after all the evidence was in, and therefore had no opportunity to present evidence on, or mold his case as to, the elements of the Article 134 offense. This claim of lack of due notice evaporates when one considers the facts of Augenblick's trial. Of the elements of the crime of sodomy the one as to which the proof was weakest was actual penetration. We cannot believe that an officer accused of this type of sodomy would or could think he would go scot-free if actual penetration were not proved beyond a reasonable doubt, but the facts of the occurrence were as found here by the court-martial. Particularly in view of Article 134's specific coverage of indecent and lewd acts, the accused must have known that in those circumstances he could be found guilty of the related, lesser offense of lewd and lascivious conduct. That would be the reasonable expectation, borne out by prior holdings of the military tribunals that lewd acts under Article 134 could be lesser offenses included in an offense such as sodomy under Article 125 or rape under Article 120. *United States* v. *Jones*, 13 C.M.R. 420, 422 (Army Bd. Rev., 1953); *United States* v. *Headspeth*, 2 U.S.C.M.A. 635, 10 C.M.R. 133 (1953). If plaintiff wished to proffer evidence relating to the lesser crime, he should have known that he had that opportunity. In the constitutional sense—that a defendant must not be convicted of a charge of which he has inadequate notice (*Rabe* v. *Washington*, 405 U.S. 313 (1972); *Cole* v. *Arkansas*, 333 U.S. 196 (1948))—there was here sufficient notice that the offense of indecent, lewd and lascivious conduct under Article 134 could and might well be implicated.

We have discussed the question in terms of fair notice, rather than of the concept of "lesser-included offense," because the former raises a constitutional issue while the latter is, in itself, merely a matter of the proper interpretation of military law. Once it is decided that the constitutionally re-

quired due notice has been given, the problem of whether lewd conduct under Article 134 is technically a lesser-included offense under Article 125 no longer rises to the constitutional plane but is, rather, a non-constitutional issue of military law with which the civilian courts cannot normally deal if the military tribunals have fairly considered the problem. *United States* v. *Augenblick*, 393 U.S. 348 (1969); *McDonald* v. *United States*, 205 Ct. Cl. 780, 507 F. 2d 1271 (1974); *Artis* v. *United States*, 205 Ct. Cl. 732, 506 F. 2d 1387 (1974). In this instance the Court of Military Appeals has expressly held that the offense for which plaintiff was convicted was properly found a lesser-included crime under Article 125 (sodomy).[9]

We have no reason to think that this view of the Court of Military Appeals is unreasonable or resulted from a lack of due and fair consideration. Before plaintiff committed his offense, that tribunal had already held, as we have pointed out, that lewd and lascivious conduct under Article 134 could be found as a lesser-included offense of sodomy or rape. As we have also suggested, it seems entirely reasonable and expectable that an incompleted act of sodomy should be treated and punished as a lewd act.

Plaintiff insists, however, that the Article 134 offense, as found here, embodies elements absent in the crime of sodomy, *i.e.* the finding that the accused's conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit on the armed forces (see footnote 8, *supra*).[10] Those elements, he says, were not proved or canvassed at the trial which concentrated solely on sodomy. The answer is that the Court of Military Appeals was certainly not out of bounds when in effect it held that (a) as charged here, the crime of sodomy, in and of itself, necessarily embodied those same elements, and (b) that in this case the court-martial could find those same elements, with respect to

[9] After the Supreme Court's reversal of our original ruling, plaintiff applied to the Court of Military Appeals to reconsider its refusal to hear his case. He raised both the Article 134 point and the contention that *O'Callahan* governed and should be retroactively applied. The Court of Military Appeals rejected both arguments on their merits. 19 U.S.C.M.A. 638 (1970).

[10] This case does not involve the part of Article 134 which refers to "crimes and offenses not capital."

Concurring Opinion by Judge Nichols

the lewd and lascivious conduct, from the nature of the acts and circumstances themselves, it being unnecessary to have extraneous or independent proof of those factors. *Cf. United States* v. *Sanchez*, 11 U.S.C.M.A. 216, 217–18, 29 C.M.R. 32 (1960).[11] We repeat that if defense counsel thought he could persuade the court-martial that the conduct here did not embody either of those elements, he was free to introduce evidence to that effect (if he could).[12]

The result is that the second ground of the second amended petition which plaintiff proffers—that Article 134 was unconstitutionally applied to his case—is without merit, along with his claim that *O'Callahan* governs his case.

We hold, for these reasons, that plaintiff's motion for leave to file a second amended petition and for relief from judgment should be denied; that defendant's motion to lift the stay of proceedings and to deny further relief should be granted; and that the order of April 4, 1969, dismissing the petition should go into effect in thirty days.[13]

NICHOLS, *Judge*, concurring:

I concur with and join in Judge Davis's opinion. I would like to say, however, that there was not at any time any need to await a decision whether *O'Callahan* v. *Parker*, 395 U.S. 258 (1969) was retroactive, because it was almost from the first apparent that Commander Augenblick's case was not one of those excluded from the jurisdiction of military tribunals by that authority. Moreover, the cloud over the constitutionality of Art. 134, dissipated in *Parker* v. *Levy*, 417 U.S. 733 (1974); and *Secretary of the Navy* v. *Avrech*, 418 U.S. 676 (1974), had not increased to the dimensions of a man's hand during the earlier part of the long delay

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[11] Plaintiff says that this is tantamount to a directed verdict of guilty, but this position is obviously incorrect. The court-martial was permitted, but not required, to find these elements from the proven circumstances. The law officer's charge was to this effect. *See* footnote 8, *supra*.

[12] He was free, of course, to inquire from the law officer, before the evidence closed, whether the latter intended to charge the lesser-included offense.

[13] Our order of October 31, 1969, stayed our order of April 4, 1969, until thirty days after action on the motion for leave to file the second amended petition (*see* footnote 2, *supra*).

period. In plaintiff's able brief of September 27, 1971, the vagueness and possible unconstitutionality of Art. 134 was urged, but without the support of the lower Federal court decisions, which later accreted to it. We could have disposed of the *O'Callahan* problem on the grounds presently to be submitted, and of Art. 134 on the cogent reasoning of Judge Davis's opinion.

I

Commander Augenblick was not booked on a felony charge under D.C. law. In *Sharkey* v. *United States*, 19 U.S.C.M.A. 26, 41 C.M.R. 26 (1969), it is held that the *O'Callahan* doctrine does not deprive the military courts of jurisdiction to try offenses that would be dealt with as petty offenses in the civilian world, not requiring jury trial. I note that on their arrest, Commander Augenblick and his companion were booked for "disorderly conduct". This would dispose of the "service connection" issue at the threshhold, if one were certain how the *Sharkey* doctrine would be applied to the instant case.

By the D.C. Code, § 22–1112, lewd, indecent or obscene acts are misdemeanors punishable, where a minor is not involved, by a fine of not over $300, or not over ninety days imprisonment, or both. They come under the ambit of "disorderly conduct" along with duelling, § 22–1102, and keeping a fierce dog, § 22–1111. This appears to be the nearest counterpart to the Art. 134 specification under which Commander Augenblick was convicted. For sodomy, by D.C. Code § 22–3502, the penalty is $1,000 fine or ten years imprisonment. This corresponds to the Art. 125 charge upon which Commander Augenblick was acquitted. I would guess that if left to civilian prosecution, Commander Augenblick would have been in slight or no jeopardy of ever being charged under § 22–3502. The booked offense, and the one that could have been proved, put him in jeopardy of moderate punishment for which the Constitution does not require indictment or jury trial. See cases cited in *Sharkey*, *supra*. I would, therefore, on authority of *Sharkey*, hold the *O'Callahan* exclusion of military courts from trying felonies committed in the civilian world, inapplicable here.

Concurring Opinion by Judge Nichols

II

Whether or not the above is accepted as valid, a concerned and principled application of the "service connection" concept requires the finding that such connection existed in this case. An article by an able and knowledgeable member of our bar, Colonel Charles M. Munnecke, *O'Callahan Revisited and Buttoned Up*, Bulletin No. 46, The Judge Advocate Journal, p. 11 (October, 1974), summarizes the decisions of the Court of Military Appeals, the lower Article III courts, and the Supreme Court, on the scope of "service connection". There is, he says, little relevant conflict among them, and the difficulty of determining "service connection" *vel non* has not been nearly as great as anticipated, save in the area of narcotics violations, which is now before the Supreme Court and may be resolved before our decision appears.

How do you determine "service connection?" The preferred technique since *O'Callahan* has been to look at the facts of *O'Callahan* and those of the case then at bar, to see if significant differences, favoring military jurisdiction, appeared. The military apparently lacked before *O'Callahan* a strong or any conviction that *O'Callahan*'s type of crime had "service connection." The order allowing *certiorari* assumed it had none and the Government briefed and argued on that basis, 393 U.S. 822 (1968). Mr. Justice Harlan, dissenting at 395 U.S. 274 (1969), urged that the military had a strong interest in deterring rape, assault, mayhem and murder by its members upon the local civilian population. This has impressed many persons as true, but it might be answered that interest in deterring an offense and interest in trying it are two different things. The certainty of being consigned to the tender mercies of an enraged civilian population and tried before a jury of the victim's peers, might be a more effective deterrent to commission of crimes of *O'Callahan*'s type, than trial by court-martial and military punishment following. Certainly *O'Callahan*, prospectively applied, does not protect servicemen against possibly harsher treatment than the military would afford, and cannot be so construed. I gather that a military accused cannot even waive a civilian jury and elect a court-martial if he so desires for his own pro-

tection. It is no wonder the military leaders are now as complacent as Colonel Munnecke indicates they are, about the situation. I should expect that even now, if needed, there could be a forceful announcement delimiting the scope of "service connection", as seen by the Service heads, and it would if reasonable be entitled to much respect. It would not have to be ignored because of prior contrary court decisons, made by civilian judges on the basis of their own unaided perceptions as to the scope of military necessity. The prevailing silence on the subject may well reflect satisfaction with "service connection" as judicially determined.

Thus "service connection" has been determined up to now by the happenstance circumstances of *O'Callahan's* particular case, and the absence of any other guide as to the scope of "service connection", plus the failure of the service to define the extent to which denial of the right to try particular offenses will hamper them in performing their missions. Nevertheless, when we have a crime to deal with wholly unlike *O'Callahan's*, it appears to me that instead of a wooden use of the *O'Callahan* circumstances as tests, we should endeavor to ascertain from Service sources a conception of what the denial of their right to try—as distinguished from the desire to deter—may mean. I do not find anything in *Relford* v. *Commandant*, 401 U.S. 355 (1971), that prohibits this.

Statutes and regulations sometimes announce special service interest in offenses of certain types. These must be regarded as stating a "service connection" by implication. In this category I would put the regulations on homosexuals that all three Services now have in force, and have had for many years, back to a time long prior to Commander Augenblick's arrest in 1961. These regulations divide homosexuals into classes I, II and III. (*See* our decision in *Glidden* v. *United States*, 185 Ct. Cl. 515 (1968)). Class I involves offenses where the other party was an unwilling participant, or a minor. The regulations call for these offenses to be tried by court-martial. Class II are other homosexual offenses currently punishable. They may be dealt with by court-martial but more usually by administrative discharge, which may or may not be under honorable conditions. Class

III are homosexual offenses committed prior to the current enlistment, and instances of persons with homosexual tendencies but no active involvement. These persons must be got out of the service, though of necessity with honorable discharges.

We may note the stress on just getting rid of the homosexual. Nothing that corresponds to this occurs in civilian justice. The military would unload their undesirables on the civilian world, but the reverse cannot occur. The time when the offender can be required to purge himself by enlisting in the military, has long passed.

I suppose that in civilian society the sovereign people formerly considered they had a right to prohibit and punish by law, behavior they considered infamous, without being required to show the offense had a victim, or in any way injured the fabric of society. This attitude was the basis of laws against sodomy, bestiality, acts against nature, etc., and continues to be the motive behind their enforcement so far as they are still enforced. The old attitude, however, is eroding, and we now are told that society has no right to punish a victimless crime. Exemptions of "consenting adults" from laws against sodomy, etc.., are frequently urged and sometimes enacted. I suppose a person who urged such exemptions might still, if heterosexual, think twice about making a long journey in company with a person he suspected to be homosexual. There is no real conflict between these two attitudes. Where the laws remain on paper unchanged, lack of zeal and enthusiasm by the civilian police in their enforcement may afford a practical shield to the homosexual in his way of life.

Civilians can choose their companions, but when you join the military you embark on an extended voyage with persons not of your choice. In the Navy, Commander Augenblick's branch, it may be six months under water in a submarine. If persons you regard as undesirables are in the crew, their companionship is foisted upon you. As concerns officers, the Services have the additional problem that those who, by their own acts, cause themselves to be popularly regarded as pariahs, can hardly provide effective leadership. The reasonableness of the popular assignment of pariahship hardly matters.

Concurring Opinion by Judge Nichols

According to Navy Regulation, 32 C.F.R. § 719.107(e)(2)(iii), 38 Fed. Reg. 5997, March 6, 1973; 719.107(c), 39 Fed. Reg. 18436, May 28, 1974, cases of homosexuality in which mild penalties have been imposed by civilian authorities upon conviction, may still be tried by court-martial. It continues:

> * * * Homosexuality is a more serious problem in the military society because of the close-contact living and working conditions of its members.

According to Everhard, *Problems Involving The Disposition of Homosexuals in the Service*, 2 Air Force Judge Advocate General's Bulletin 20 (Nov. '60) another basic concern of the Services about homosexuals is infection of others: "* * * they must have partners and often prey on the youthful, naive, or greedy." "Cures", psychiatric or otherwise, are not considered because "it is not primarily a Service responsibility", and "the prognosis is almost uniformly poor." This attitude is in contrast with civilian judges, who frequently demand psychiatric treatment for convicted homosexuals. The Service's first, second and third priority in dealing with homosexuals are, as stated, to get rid of them. I take it Commander Augenblick had his court-martial because, as a regular officer, he was immune to stigma type administrative discharge. *See*, *Carter* v. *United States*, *ante* at 61. All the court-martial did to him, however, was the stigma type discharge, which might have been inflicted administratively on a reservist.

I think the foregoing demonstrates that the Services have and have expressed a special and peculiar interest in setting their own course of dealing with their homosexuals, whether an offense is committed on or off the base, in or out of uniform, during working or leave time. Effectuating their policy is seen as a military necessity. Civilian judges could not possibly achieve the results demanded by the military. On the other hand, the Services do not desire either to reform the offender, or to inflict retribution for breach of the Mosaic law upon him. Except in the aggravated Class I cases, they are content to get rid of him albeit with a stigma type discharge in some instances, as here.

Concurring Opinion by Judge Nichols

Conceding, however, that "service connection" would be a problem if one of the partners in the unnatural act had been a civilian (*United States* v. *Shockley*, 18 U.S.C.M.A. 610, 40 C.M.R. 322 (1969)) here they were both military, and one, Commander Augenblick, greatly outranked the other. As I conceive it—and we do not, I note again, have the help we should have from the military—the guilt of partners in crime or accomplices is never equal if one is an officer and the other an enlisted man. The former owes a duty to the latter to guide him into courses of right conduct. A breach of this duty would be an offense unknown to the civilian law. The latter is conceived to be without capacity to act on his own volition when in company of an officer and under his direction. That Commander Augenblick wore civilian clothes I do not think exonerated him from these duties, at least as long as the accomplice was uniformed. He could not shed his obligations as an officer by putting on civilian clothes and going off the base for his contact. I do not think a civilian judge or jury could handle this situation in a satisfactory manner. I note that Colonel Munnecke enumerates this very case as one where the *victim* (his word) was a serviceman. (His fn. 5, p. 12). This is an appropriate classification of the case from a military point of view. The word "victim" is also used in the plaintiff's September 27, 1971, brief, albeit in quotation marks. The Commander would be regarded as having "preyed" on the enlisted man, in the word used in the Everhard article, *supra*. Counsel for Commander Augenblick have complained about the honorable discharge given the enlisted man, but the apparent disparity is fully explained by the considerations stated. He was a "victim".

Moreover, I would assign at least presumptive correctness to the decision by the Metropolitan police to turn the arrested offenders over to military custody. It was, by implication, a decision that the offense had "service connection", by the persons having to deal with the problem practically, at the working level.

In short, the application of the *O'Callahan* doctrine to this case is not a logical application of it but its *reductio ad absurdum*.

Syllabus

LARAMORE, *Senior Judge*, concurs in the opinion of Judge Davis and also concurs in the opinion of Judge Nichols regarding "service connection."

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508 F. 2d 1333

JOHN SARACENA, JOHN L. WOJCICKI, JOSEPH SCHIESS, JR., CHARLES GOTTSCHALCK, JOSEPH LOUIS, ROBERT SCIMONE and GRACE SCHIESS, ADMINISTRATRIX OF THE ESTATE OF EDWARD SCHIESS, Deceased v. THE UNITED STATES

[No. 216–74. Decided January 22, 1975]

ON DEFENDANT'S MOTION TO DISMISS

Internal Revenue laws and regulations; rewards for information relating to violations of laws; discretion of District Director.—In 1962 the seven plaintiffs found $2,438,110 in the trunk of an old car while renovating a private garage in Jersey City, New Jersey. Plaintiffs notified the FBI which took possession of the money and thereafter turned it over to the United States Marshal for the District of New Jersey. After it was established that the money belonged to a Mr. Moriarty and that the United States was entitled to use this money to reduce the amount of his back taxes, the District Director of Internal Revenue gave the plaintiffs a reward totaling $32,131 which was approximately 1.32% of the amount recovered by the United States in taxes and other assessments against the owner. Plaintiffs filed suit to contest the small amount of the reward. It is *held* that 26 U.S.C. § 7623 and the implementing regulation 26 C.F.R. § 301.7623–1 vest broad discretion in the District Director of the Internal Revenue Service to determine the amount of the reward paid under that section, and that plaintiffs have failed to show that the determination in this instance was an abuse of his discretion. Defendant's motion to dismiss is granted, and the petition is dismissed.

Regulation of Executive Department; administrative or executive discretion; scope of review of Court of Claims.

[1] Where Congress has committed to the head of a department certain duties requiring the exercise of judgment and discretion, the court will not review his action thereon, whether it involves questions of law or fact, unless he has exceeded his authority or his action was clearly wrong.

Administrative Law and Procedure ⇐ 760

Regulation of Executive Department; construction and operation; administrative construction.

[2] To sustain an administrative interpretation of a broadly written regulation, such as 26 C.F.R. § 301.7623–1 relating to rewards for information relating to violations of internal revenue laws, it is not necessary for the reviewing court to find that the agency construction is the only reasonable one or that it is the result the court would have reached had the question arisen in the first instance in judicial proceedings. The judicial function is exhausted when it is found that there is a rational basis for the conclusions of the administrative agency.

Internal Revenue ⇐ 2484

Taxes; revenue laws; reward for information re violations of internal revenue laws.

[3] Since 26 C.F.R. § 301.7623–1 vests complete discretion in the first instance in the District Director to determine whether an award should be made and, in the second, to fix what, in his judgment, amounts to adequate compensation, the mere fact that the reward was less than the 10% mentioned in the regulation as a possible upper limit does not authorize this court to set aside the award and order a trial to determine adequate or reasonable compensation. The burden is on plaintiffs to establish that there was no rational basis for the administrative determination.

Internal Revenue ⇐ 2484

Taxes; revenue laws; reward for information re violations of internal revenue laws; implied contract, basis for.

[4] 26 C.F.R. § 301.7623–1 authorizing payment of a reward in the amount the District Director deems adequate compensation for information leading to the detection and punishment of persons guilty of violating or attempting to violate the internal revenue laws, does not give rise to an implied contract to pay a definite sum.

Internal Revenue ⇐ 2484

Joseph M. Jacobs, attorney of record, for plaintiff.

Theodore D. Peyser, *Donald H. Olson*, and *Kenneth R. Pike*, with whom was *Assistant Attorney General Scott P. Crampton*, for defendant.

Before COWEN, *Chief Judge*, DAVIS and BENNETT, *Judges*.

COWEN, *Chief Judge*, delivered the opinion of the court:

In 1962, plaintiffs found more than two million dollars in United States currency which they turned over to the Govern-

ment. After the Internal Revenue Service had applied all the money to the recovery of income taxes, penalties, and fines due by the individual to whom the funds belonged, the District Director of the IRS paid each plaintiff a reward. They brought this action to recover additional amounts as rewards, claiming that the amounts paid were inadequate and that the determination of the amount of the reward was not made in compliance with 26 U.S.C. § 7623 and Treasury Regulation 26 C.F.R. 301.7623–1. The case is before the court on defendant's motion to dismiss for failure to state a cause of action upon which relief can be granted. After considering the briefs of the parties and the facts admitted by defendant's motion, we conclude that the amount of the reward was determined pursuant to a statute and regulation which vest broad discretion in the District Director of the Internal Revenue Service, and that plaintiffs have failed to show that his determination was an abuse of the discretion reposed in him. Therefore, we grant defendant's motion to dismiss.

The plaintiffs are seven workmen who were employed during the summer of 1962 to remove old doors and install new ones in several garage buildings in Jersey City, New Jersey.[1] In the course of their work on July 3, 1962, they found $2,438,110 in United States currency in the trunk of an old car in one of the garages. Upon finding the money, plaintiffs notified the Federal Bureau of Investigation, whereupon FBI agents took possession of the currency and turned it over to the United States Marshal for the District of New Jersey. Shortly after the money was found, it was discovered that it probably belonged to one Joseph V. Moriarty. On July 5, 1962, the Internal Revenue Service effected a jeopardy assessment for delinquent income taxes and interest due from Mr. Moriarty in an amount which exceeded the currency found by plaintiffs. Thereafter, the Internal Revenue Service caused a lien to be filed in Hudson County, New Jersey, and a notice of levy to be served upon the U.S. Marshal who, on July 16, 1962, paid the $2,438,110 into the Treasury of the United States.

[1] One of the workmen, Edward Schiess, has died since the money was found, and is represented in this action by Grace Schiess, the administratrix of his estate.

On September 19, 1962, when Mr. Moriarty filed a tax return for 1961, he reported the $2,438,110 as "other income" and requested that any moneys refundable to him be used to reduce his back taxes. The entire sum, which the workmen turned over to the FBI, has been applied to income taxes, penalties, fines, and forfeitures owed by Mr. Moriarty.

Beginning in 1962, several law suits were filed by parties claiming an interest in the $2,438,110. The United States District Court for the District of New Jersey held that Hudson County, New Jersey, was entitled to the money. On February 25, 1969, the seven plaintiffs filed an application and a public voucher for a reward based on their having turned over the currency to Federal authorities and the fact that all of it was applied to the recovery of taxes, penalties, fines, and forfeitures owed by Mr. Moriarty. The application was not acted upon by the District Director of Internal Revenue pending a review of the District Court's decision by the Court of Appeals for the Third Circuit. On January 25, 1972, the Court of Appeals reversed the judgment of the District Court, dismissed the complaint of Hudson County, and held that the United States was the owner of the money. *See Stapleton* v. *Two Million Four Hundred Thirty-Eight Thousand, One Hundred and Ten Dollars*, 454 F. 2d 1210 (3rd Cir.), *cert denied*, 409 U.S. 894 (1972).

On May 9, 1974, after it was firmly established that the United States would be able to retain the money and apply it to the taxes due by Mr. Moriarty, the District Director of the Internal Revenue Service awarded each of the plaintiffs or their heirs $4,590. The total amount of the reward was $32,131, which was approximately 1.32 percent of the amount recovered by the United States in taxes and other assessments against Mr. Moriarty.

Plaintiffs' claims are based on 26 U.S.C. § 7623 and the implementing regulation, 26 C.F.R. § 301.7623–1, which provide:

> § 7623. EXPENSES OF DETECTION AND PUNISHMENT OF FRAUDS
>
> The Secretary or his delegate, under regulations prescribed by the Secretary or his delegate, is authorized to pay such sums, not exceeding in the aggregate the

sum appropriated therefor, as he may deem necessary for detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws, or conniving at the same, in cases where such expenses are not otherwise provided for by law.

§ 301.7623–1 *Rewards for information relating to violations of internal revenue laws.*

(a) *In general.* A district director may approve such reward as he deems suitable for information that leads to the detection and punishment of any person guilty of violating any internal revenue law, or conniving at the same. The rewards provided for by section 7623 are limited in their aggregate to the sum appropriated therefor and shall be paid only in cases not otherwise provided for by law.

* * * * *

(c) *Amount and payment of reward.* All relevant factors, including the value of the information furnished in relation to the facts developed by the investigation of the violation, shall be taken into account by a district director in determining whether a reward shall be paid, and, if so, the amount thereof. The amount of a reward shall represent what the district director deems to be adequate compensation in the particular case, normally not to exceed 10 percent of the additional taxes, penalties, and fines which are recovered as a result of the information. No reward, however, shall be paid with respect to any additional interest that may be collected. Payment of a reward will be made as promptly as the circumstances of the case permit, but generally not until the taxes, penalties, or fines involved have been collected. However, the informant may waive any claim for reward with respect to an uncollected portion of the taxes, penalties, or fines involved, in which case the claim may be immediately processed. No person is authorized under these regulations to make any offer, or promise, or otherwise to bind a district director with respect to the payment of any reward or the amount thereof.

It is the position of the plaintiffs that once the District Director determined that a reward was due them, it was incumbent upon him to fix the amount upon a reasonable basis and that no reasonable basis has been shown. The argument continues that, since the regulation lays down a standard—10 percent of the additional taxes, penalties, and fines

involved—the small amount of the reward demonstrates, without more, that the decision was arbitrary and that the burden is on the defendant to show the propriety of such a deviation from the standard set forth in the regulation.

Unfortunately for plaintiffs' contentions, the regulation before us gives the District Director of Internal Revenue Service such broad discretion that the scope of our review of his decision is very limited. In defining the narrow scope of judicial review in such cases, the Supreme Court stated:

> * * * More than a half-century ago this Court declared that "where Congress has committed to the head of a department certain duties requiring the exercise of judgment and discretion, his action thereon, whether it involve questions of law or fact, will not be reviewed by the courts, unless he has exceeded his authority or this court should be of opinion that his action was clearly wrong." * * * [*United States* v. *Shimer*, 367 U.S. 374, 381–82 (1961)]

The rule there announced by the Supreme Court has been followed by many decisions of this court. *See, e.g., Odian* v. *United States*, 203 Ct. Cl. 306 (1973); *Port Authority of St. Paul* v. *United States*, 193 Ct. Cl. 108, 432 F. 2d 455 (1970); *Daniels* v. *United States*, 187 Ct. Cl. 38, 407 F. 2d 1345 (1969).

Stated another way, to sustain an administrative interpretation of such a broadly written regulation, it is not necessary to find that the agency construction is the only reasonable one or that it is the result the court would have reached had the question arisen in the first instance in judicial proceedings. *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). The judicial function is exhausted when it is found that there is a rational basis for the conclusions of the administrative agency. *Mississippi Valley Barge Line Co.* v. *United States*, 292 U.S. 282, 286–87 (1934).

It is clear from the language of the regulation that the District Director has complete discretion in the first instance to determine whether an award should be made and, in the second, to fix what, in his judgment, amounts to adequate compensation. There is no statutory or regulatory requirement for a hearing or a well reasoned explanation of the decision. The mere fact that the reward was less than the 10 percent mentioned in the regulation as a possible upper limit

does not authorize the court to set aside the award and order a trial to determine adequate or reasonable compensation. Plainly, the amount of the reward was within the range contemplated by the statute and the regulation. The burden is on the plaintiffs to establish that there was no rational basis for the District Director's decision, and they have failed to discharge that burden.

Moreover, there was no express contract to pay plaintiffs compensation, and it has been held that the regulation here involved, as well as similar regulations in force under prior laws, do not give rise to an implied contract. *See Schein* v. *United States*, 352 F. Supp. 182, 185–86 (E.D.N.Y. 1972); *Gordon* v. *United States*, 92 Ct. Cl. 499, 36 F. Supp. 639 (1941); *Katzberg* v. *United States*, 93 Ct. Cl. 281, 36 F. Supp. 1023, *cert. denied*, 314 U.S. 620 (1941).

For the reasons stated, defendant's motion to dismiss is granted, and plaintiffs' petition is hereby dismissed.

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510 F. 2d 364

AUBREY E. DOUGLAS v. THE UNITED STATES

[No. 197-70. Decided January 22, 1975] *

ON THE PROOFS

Patents; patentability; obviousness; validity.—Plaintiff seeks reasonable and entire compensation for the alleged unauthorized use by defendant of an invention described and claimed in United States Patent No. 2,601,104 relating to jet propulsion and control means therefor. Defendant asserts invalidity of the patent on the grounds of lack of utility, insufficient disclosure and obviousness, as well as asserting noninfringement and absence of liability by reason of "experimental use." During pretrial proceedings, claims 1–3, 5 and 8 were alleged to be infringed; however, since plaintiff's brief and proposed findings are restricted to claim 1, only that claim has been considered. It is *held* that, giving due regard to the subject matter involved and the circumstances existing in 1945 when the patent application was filed, the disclosure adequately describes a mechanism for directionally controlling the thrust of a jet engine. It is also *held*, for the reasons stated, that claim 1 is invalid for obviousness. The court also concludes that it is not necessary for it to rule on the defenses of noninfringement and absence of liability

*Plaintiff filed a *petition for certiorari* on April 16, 1975.

Syllabus

by reason of "experimental use." Plaintiff is not entitled to recover as a matter of law, and the petition is dismissed.

Patents; specifications; sufficiency of disclosure.

[1] A patent specification is not required to be a production blueprint for constructing a device, nor can a patentee be expected to foresee every technological problem that may be encountered in adapting his idea to a particular use. Some experimentation and exercise of judgment is to be expected.

Patents ⇐ 99

Patents; patentability; operability; generally.

[2] In determining whether an invention is sufficiently operative to satisfy the "useful" requirements of 35 U.S.C. § 101, the mere fact that problems may be encountered in adapting the device to a particular apparatus having particular characteristics or that in one mode of its operation some additional controls would be required does not detract from the overall operativeness of the device.

Patents ⇐ 46

Patents; patentability; obviousness; generally.

[3] Although resolution of the obviousness issue within the meaning of 35 U.S.C. § 103 is ultimately one of law, certain basic factual inquiries must be made to set the context for the ultimate legal conclusion.

Patents ⇐ 18

Patents; patentability; skill in the art.

[4] The level of skill of those working on inventions involving obvious complexities, such as a jet-propelled airplane, must be considered to be relatively high, although such skill may be less well developed than a few years later when the accused structures were produced.

Patents ⇐ 18

Patents; claims; define invention.

[5] The claims of a patent are the measure of the invention and resolution of the obviousness question must be based on what is claimed. Thus, since plaintiff only discloses, and claims, a mechanism for varying the thrust of a jet engine to achieve certain results, but has left it to those in the art to determine how to accomplish that without adversely affecting the controlability of the airplane, it is in that context that obviousness must be determined.

Patents ⇐ 18

Patents; validity; presumption of validity; rebuttable presumption.

[6] Where the most pertinent prior art references were not cited by the examiner during prosecution of the patent application, the presumption of patent validity to which the patentee is entitled is greatly weakened, if not entirely overcome.

Patents ⇐ 112.3(3)

Per Curiam

Patents; patentability; commercial success.

[7] As a means of guarding against slipping into use of hindsight, commercial success in support of nonobviousness is a consideration. However, to be of any value on the issue of obviousness, success must be attributable to the *claimed* invention and not to other factors.

Patents ⇐ 18

Robert B. Russell, attorney of record, for plaintiff. *Russell & Nields*, of counsel.

Donald E. Townsend, with whom was *Assistant Attorney General Carla A. Hills*, for defendant.

Before DURFEE, *Senior Judge*, KASHIWA and KUNZIG, *Judges*.

PER CURIAM:* In this suit under 28 U.S.C. § 1498, plaintiff seeks reasonable and entire compensation for the alleged unauthorized use by defendant of an invention described and claimed in his U.S. Patent No. 2,601,104, entitled "Jet Propulsion and Control Means Therefor," issued June 17, 1952. Jurisdiction is acknowledged and ownership of the patent is uncontested.

The suit involves jet-propelled airplanes. Accused to infringe are six British-made airplanes (called the Kestrel) and 11 replacement engines (called the Pegasus) that were brought to this country by defendant in late 1965. In addition, plaintiff alleges infringement by reason of the production version of the Kestrel (renamed the Harrier) being demonstrated by the British in this country in May, 1969. Defendant asserts invalidity of the patent on the grounds of lack of utility under 35 U.S.C. § 101, insufficient disclosure under 35 U.S.C. § 112 and obviousness under 35 U.S.C. § 103. In addition, defendant urges the defenses of noninfringement and absence of liability by reason of "experimental use." During pretrial proceedings, claims 1–3, 5 and 8 were

* This opinion incorporates the greater part of the opinion prepared by Trial Judge Hal D. Cooper, with modifications and additions by the judges. The Trial Judge considered the issue of the invalidity of the patent and held that it was invalid. He then went on to consider whether, in the event the patent was held to be valid, there was an infringement. Since this court holds that the patent was invalid, we do not decide the second issue.

alleged to be infringed.[1] However, plaintiff's brief and proposed findings are restricted to claim 1. Accordingly, only that claim will be considered herein.

For the reasons stated hereinafter, we find that claim 1 is invalid for reasons of obviousness. It is not necessary for this court to rule on the defenses of noninfringement and absence of liability by reason of "experimental use" urged by the defendant.

Jet engines employ a jet pipe or tube through which hot combustion gases are directed to produce the thrust required to propel an airplane. Normally, the jet pipe opens rearwardly of the plane so that the propelling gases issue from the jet pipe in a direction opposite to the line of forward flight of the airplane. This suit is concerned with the manner in which the thrust generated by a jet engine may be used, in addition to propelling the aircraft in the normal forward direction, to alter the conventional mode of takeoff and landing. Reference will be made to VTOL, STOL and V/STOL. The term VTOL indicates "vertical takeoff and landing" and refers to the takeoff or landing of a fixed-wing aircraft by only vertical movement of the aircraft. The term STOL indicates "short takeoff and landing" and refers to a fixed-wing aircraft that either takes off or lands with only a short horizontal run of the aircraft. The term V/STOL indicates "vertical and/or short takeoff and landing" and refers to an aircraft that is capable of operating in both the VTOL and STOL modes. The term "vectored thrust" will be used herein. That term refers to the directional control of the thrust generated by the jet engine whereby the thrust may be directed to a desired angle other than directly rearward of the plane.

The Douglas patent proposes a mechanism for selectively diverting the combustion gases of a jet engine to a direction other than that of their normal flow so that the thrust may be utilized for braking the airplane, or for assisting takeoff or landing, or for control purposes. Three embodiments are disclosed in the patent. The first (Figs. 1 and 2) employs a

[1] Since references to the several claims and the various figures in the patent are made in this opinion, we have reproduced the patent as an appendix to this opinion.

baffle for diverting at least a portion of the combustion gases from the jet tube to a pivotally mounted conduit. By pivoting the conduit, the thrust of the engine may be directed toward the ground and either forward (to brake the airplane) or backward (for increasing the lift of the plane). The second embodiment (Figs. 3–5) employs, at the exit end of the jet tube, a number of arcuate members nested together and supported on a common pivot to form a curved conduit for directionally controlling the flow of combustion gases for the same purposes as the embodiment of Fig. 1. The third embodiment (Figs. 6 and 7) has the engine mounted transversely of the aircraft with a pivotally mounted L-shaped conduit for directing the thrust of the engine in the desired direction.

In all three embodiments, directional control of the thrust is achieved by some form of a pivotally mounted conduit movable in a plane substantially perpendicular to the wing. By, for example, pivoting the conduit of any one of the three embodiments downwardly and rearwardly, the thrust of the engine produces two rectilinear components, one acting horizontally to move the plane forward and the other acting vertically to provide lift for the plane. This is the concept of "vectored thrust," *i.e.*, the thrust generated by the engine has both magnitude and direction and is resolvable into rectilinear components.

The advantages of vectoring the thrust, as stated in the patent and during the prosecution of the application, are several. By directing the thrust downward and rearward, the forward speed of the airplane may be decreased while the engine is maintained at full power. This has particular advantages during landing in that the increased lift generated by the downward component of the thrust decreases both the plane's landing speed and the length of the landing run. Moreover, by maintaining the engine at full power, it is immediately available in the event of an emergency. During takeoff, the downward component of thrust decreases the speed at which the plane becomes airborne and thus decreases the length of the takeoff run. In short, and as Douglas stated it in his patent, "a slow running aircraft and a fast running engine is thus made possible."

Per Curiam

The sufficiency and operability of the Douglas disclosure

At the outset, defendant argues that the patent is invalid by reason of an inadequate disclosure under 35 U.S.C. § 112. Defendant's attack is based primarily on the absence of any disclosure in the patent regarding the many technological problems encountered and solved by the British company in producing the accused Kestrel and Harrier airplanes. However, a patent specification is not required to be a production blueprint for constructing a jet airplane. *Trio Process Corp.* v. *L. Goldstein's Sons, Inc.*, 461 F. 2d 66, 74 (3d Cir. 1972), *cert. denied*, 409 U.S. 997 (1972). Nor can a patentee be expected to foresee every technological problem that may be encountered in adapting his idea to a particular use. Some experimentation and exercise of judgment is to be expected. *Binks Manufacturing Co.* v. *Ransburg Electro-Coating Corp.*, 281 F. 2d 252, 257 (7th Cir. 1960), *appeal dismissed*, 366 U.S. 211 (1961); *International Nickel Co.* v. *United States*, 175 U.S.P.Q. 209, 214–15 (Trial Div. Ct. Cl. No. 330–68, Aug. 10, 1972, settled by stipulation). Giving due regard to the subject matter involved and the circumstances existing in 1945 when the application was filed, *Bowser, Inc.* v. *United States*, 181 Ct. Cl. 834, 388 F. 2d 346 (1967), the disclosure adequately describes a mechanism for directionally controlling the thrust of a jet engine.

Defendant's argument that the patent fails to disclose a device that is sufficiently operative to satisfy the "useful" requirements of 35 U.S.C. § 101 is equally without merit. Plainly, the disclosed device is capable of performing the function attributed to it, that is, directionally controlling the thrust of a jet engine. The mere fact that problems may be encountered in adapting the device to a particular airplane having particular characteristics or that in one mode of its operation some additional controls would be required does not detract from the overall operativeness of the device. *Hildreth* v. *Mastoras*, 257 U.S. 27, 34 (1921).

Obviousness of claim 1

Defendant's principal attack on the validity of the patent is the contention that claim 1 merely defines subject matter that would have been obvious within the meaning of 35

U.S.C. § 103. Although the resolution of the obviousness issue is ultimately one of law, certain basic factual inquiries must be made to set the context for the ultimate legal conclusion. *Graham* v. *John Deere Co.*, 383 U.S. 1, 17 (1966).

a) *The prior art*

Douglas was not the first to propose the idea of directionally controlling the thrust of a jet engine either to brake or increase the lift of an airplane. As early as 1918, in British Patent No. 118,123 granted to Harris, a jet engine for propelling an airplane was disclosed. That patent specifically proposed that the tubes through which the propelling gases passed could be:

> * * * angularly movable in a vertical direction on horizontal trunnions or pivots for enabling or assisting the aeroplane to rise or descend, and/or the tube may be movable laterally for enabling or assisting the aeroplane to turn. Normally of course the tube would occupy a position in which the aeroplane would be propelled horizontally in a straight path, and to change the movement of the aeroplane means may be provided to enable the pilot to readily alter the position of the tube as required. The tube may be moved to discharge the stream in the front of the aeroplane to produce a braking action and thus retard the speed of the aeroplane when landing. * * *

The prior patents to Anxionnaz (No. 2,396,911), Meyer (No. 2,420,323), and Lysholm (No. 2,280,835), and the text, GAS TURBINES AND JET PROPULSION FOR AIRCRAFT by Smith, all disclose, broadly, the concept of vectoring (*i.e.*, directionally controlling) the hot combustion gases of a jet engine. Lysholm, like Harris, suggests that directional control of the gases may be employed either for increasing the lift or for braking the aircraft. Anxionnaz, Meyer, and Smith disclose deflection of the hot gases for increasing the lift or for maneuvering the aircraft. The Higby patent (No. 1,704,895), instead of vectoring hot gases, discloses the concept of vectoring cold air from a centrifugal fan for imparting lift and assisting in maneuvering the airplane.

These prior art patents disclose a variety of ways for deflecting or vectoring the thrust. Anxionnaz uses shutters or

flaps; Lysholm employs fixed conduits and flow control valves for channeling the thrust through the selected conduit; a swivelling nozzle is disclosed in the Smith text; in Harris, the jet tubes are pivotally mounted; and in Higby, pivoting conduits are used. Lysholm specifically discloses that deflection of the jet thrust will result in a fast running engine and a slow moving aircraft; that result is also inherent in both Harris and Meyer.

b) *Differences between the prior art and claim 1*

The functional concept expressed in claim 1 is that of diverting the combustion gases from a jet engine "to effect, in at least one position of the discharge conduit, a braking reaction on the aircraft." This concept is expressly disclosed in the Harris patent. The differences between the Harris patent and claim 1 reside in the specific means for diverting the combustion gases. In particular, claim 1 specifies three elements: (a) means for diverting the gases from the jet tube, (b) a discharge conduit for receiving the diverted gases, and (c) means mounting the discharge conduit for pivoting movement. Harris does not disclose any means for diverting the gases from the jet tube; rather, Harris contemplates that the jet tube itself would be pivotally supported and would be used as the discharge conduit. Harris' arrangement would necessarily have the outlet of the jet tube "movable about an axis in an arc of approximately 180°, in a plane substantially perpendicular to the plane of the wing" as called for in claim 1.

The Higby patent differs from the combination of claim 1 in two respects. By specifying "combustion gases," it is implied in claim 1 that the propelling jet is a jet engine; Higby utilizes a cold air centrifugal fan. Higby also differs from claim 1 in that the range of movement of the pivotable conduits in Higby would not be sufficient to direct the thrust in a forward direction to achieve a braking reaction. However, Higby does disclose a means for diverting flow of a gas from a rearward direction, a discharge conduit for receiving the diverted gases, and means mounting the discharge conduit for pivoting movement for directional control of those gases.

c) *Level of skill in the art*

The first flight of a jet-propelled airplane occurred in 1939. In 1941, as a result of development work commencing in the late 1920's, the British flew their first jet airplane. The design of the powerplant used in that airplane subsequently was brought to the United States, and by late 1943 and early 1944, jet airplanes had been designed, built, and flown in this country. Thus, as of October, 1945, the field of jet propulsion, although in its infancy, had evolved into a working reality and had become a specialized part of the larger field of aircraft powerplants. In view of its obvious complexities, the level of skill of those working in that field must be considered to be relatively high, *Westinghouse Electric Corp.* v. *Titanium Metals Corp. of America*, 454 F. 2d 515 (9th Cir. 1971), *cert. denied*, 407 U.S. 911 (1972), although less well developed than when the accused structures were produced. At the least, the level of skill in 1945 had progressed beyond that represented by the disclosures of the prior art references discussed herein.

d) *The obviousness determination*

At the outset, it is necessary to address a matter not heretofore mentioned but which appears to be the major argument advanced by plaintiff for nonobviousness. Plaintiff contends the Douglas patent discloses that the resultant force of the deflected jet thrust must pass "near to or through the center of gravity of the aircraft." This feature, plaintiff asserts, is "the patentee's vital contribution to the art" and is "essential" to the success of a V/STOL airplane.

There are two difficulties with this argument. The first is that the Douglas patent nowhere discloses that the resultant force must pass through or near to the center of gravity either of the engine or of the aircraft. Indeed, during the prosecution of the patent, Douglas attempted to amend his disclosure to include this "teaching" but the Patent Office required its cancellation on the basis that it was not disclosed in the application as originally filed. Obedient to this requirement, and without argument, Douglas canceled the amendatory material.

Figure 6 of the patent does pictorially illustrate an arrangement in which the resultant force would act through the

center of gravity. However, that showing does not aid plaintiff in his argument. Neither the elected species of Fig. 1, nor the embodiment of Fig. 3, disclose such a relationship. Since two of the three embodiments disclosed do not illustrate that relationship, it can hardly be said that the patent teaches that the resultant *must* act through a certain point.[2]

Thus, it is attributing too much to Douglas to assess the obviousness of his contribution, as defined by claim 1, in the context of an airplane in which the proper relationship between the vectored thrust and the center of gravity is maintained. The facts are that Douglas only proposed a solution to the problem of how, mechanically, to directionally vary the thrust, not how to vary the thrust while maintaining controllability of the aircraft. From the standpoint of adequacy, the specification will permit no broader interpretation. The pictorial illustration of Fig. 6, from which it may be *inferred* that the thrust acts at or near to the center of gravity, is impractical.

The second difficulty with plaintiff's argument is that this vital feature is not covered by claim 1. The arrangement of Fig. 6 falls outside the language of the claim, which requires the jet tube to be parallel to the line of flight. Moreover, the only claim that specifically defines the point through which the resultant acts is dependent claim 8 wherein the resultant is described as passing through "a point between the leading and trailing edges of the wing." However, even that limitation does not describe the resultant as passing through the center of gravity of the aircraft since, in conventional aircraft, the center of gravity is located at the quarter chord of the wing.

The claims are the measure of the invention and resolution of the obviousness question must be based on what is claimed. *Kemode Manufacturing Co.* v. *United States*, 171 Ct. Cl. 698, 347 F. 2d 315 (1965). Since Douglas only discloses, and claims, a mechanism for varying the thrust of a jet engine to achieve certain results, but has left it to those in the art

[2] There is some evidence that one ordinarily skilled in the art in 1945 would understand that the embodiments of Figs. 1 and 3 should be so arranged that the resultant would act through the center of gravity. That evidence, while helpful to plaintiff on the question of operativeness, is contrary to plaintiff's nonobviousness contentions.

to determine how to accomplish that without adversely affecting the controllability of the airplane, it is in that context that obviousness must be determined. Turning then to claim 1, it is apparent from the foregoing analysis of the prior art that the Harris patent discloses the basic concept of vectoring the jet thrust to provide either lift or braking. This basic concept being known, the remaining aspects of the claim relate only to the mechanics by which the thrust is directionally controlled.

The prior art discloses a variety of ways for directionally controlling the propelling thrust in an airplane. Harris discloses pivoting the jet tubes for that purpose. While Harris is ambiguous in that it is unclear whether the entire engine would be pivoted with the tubes or the jet tubes would pivot independently of the engine, this does not alter the pertinence of that reference. Even if it is assumed that Harris intended the engine to pivot as a unit with the tubes, Higby discloses a mechanism for maintaining the engine stationary while directionally controlling the thrust. In view of Higby, the conclusion is inescapable that one skilled in the art who wanted to accomplish the objectives of Harris, but without pivoting the engine, would find it obvious to use the independently pivotable conduits disclosed by Higby. No new and unobvious function would result from such a modification of Harris.

Given the relatively high level of skill in this particular art, given the suggestion in Harris for pivotally supporting the jet tube, and given the disclosure of the Higby patent in which pivotally mounted conduits are plainly disclosed, it must be concluded that it would have been obvious in 1945 that the claimed arrangement of conduits could be used to control the direction of the thrust.

In reaching this conclusion, due regard has been given to the presumptively correct decision of nonobviousness implicit in the patent examiner's allowance of this patent. However, neither Harris nor Higby was cited by the examiner. Where, as here, the most pertinent prior art references were not cited by the examiner, the presumptions to which the

patentee is entitled are greatly weakened, if not entirely overcome. *Nossen* v. *United States*, 189 Ct. Cl. 1, 416 F. 2d 1362 (1969), *rehearing denied*, 191 Ct. Cl. 198, 422 F. 2d 1340 (1970), *cert. denied*, 400 U.S. 823 (1970).

As a means of guarding against "slipping into use of hindsight," *Monroe Auto Equipment Co.* v. *Heckethorn Manufacturing & Supply Co.*, 332 F. 2d 406, 412 (6th Cir. 1964), *cert. denied*, 379 U.S. 888 (1964), the secondary considerations urged by plaintiff in support of nonobviousness have also been carefully reviewed. In large part, these are based on the undisputed success of the Kestrels and Harriers which were the first usable aircraft with V/STOL capabilities and which are the only operational aircraft with that capability even today. However, to be of any value on the issue of obviousness, success must be attributable to the *claimed* invention and not to other factors. *Palmer* v. *United States*, 182 Ct. Cl. 896, 904 (1968). Here, the evidence shows that other factors are highly significant to the success of those airplanes.[3]

As noted previously, a major consideration in V/STOL airplanes is the pilot's ability to control the airplane during vectoring of the thrust. Controllability was achieved in the accused planes in two ways. The first was the use of four nozzles so arranged that the resultant force of the vectored jets acted at or near to the center of gravity of the airplane. The other was the use of a system of puffer jets to provide an auxiliary control. Neither of these is disclosed nor claimed in the Douglas patent.

In summary, Douglas proposed a specific mechanism for accomplishing the objectives earlier suggested by Harris. The mechanism itself was an obvious variation of that previously suggested by Higby. Unobviousness, if any, lay not in the mechanism but in the manner in which the mechanism was used in an airplane to vary the thrust direction while maintaining controllability of the airplane. The builders of the

[3] Although plaintiff did disclose his ideas to the British company that designed the Pegasus, there is no evidence that any use was made of those disclosures by that company.

accused Pegasus, by expending some $70 million in the development of that engine, solved that problem, not Douglas. Having contributed nothing to the development of the critical relationship, Douglas cannot rely on the subsequent success of the accused airplanes to sustain the validity of his patent.

Claim 1 is invalid under 35 U.S.C. § 103. The patent being invalid, the petition must be dismissed.

FINDINGS OF FACT

1. U.S. Patent No. 2,601,104, entitled "Jet Propulsion and Control Means Therefor," issued June 17, 1952, on an application filed September 10, 1946. The patent claims the priority date of British Patent No. 643,969, filed in Great Britain on October 15, 1945.

2. Aubrey E. Douglas, an individual, is a British subject residing at Saltford Farm, Somerset, England. Plaintiff Douglas' ownership of the patent has not been contested in this suit. Plaintiff did not appear at the trial, defendant having waived its right to require his presence.

Disclosure of the patent

3. The problem of controlling a jet aircraft is particularly critical at slow speeds when the effect of the airfoil surfaces is less due to the reduced velocity of the air passing over them. Thus the control of all fixed-wing aircraft is said to be "sluggish" as the aircraft approaches the stall speed. This problem is compounded in jet-propelled fixed-wing aircraft by the fact that jet engines do not accelerate rapidly. Thus, if the pilot desires a sudden burst of power from the engine, as in a balked landing situation, a jet engine is poorly equipped to provide it. As a result, jet aircraft have been required to land at high speed, to the detriment of certain other safety factors, and with the requirement of long landing fields.

4. The patent in suit discloses apparatus for the control of jet-propelled aircraft during takeoff, landing, and while airborne. In particular, Douglas' idea was to divert the efflux of the jet away from the normal rearward direction, to various other directions including downward and rearward, di-

rectly downward, downward and forward, and/or directly forward so as to provide lift and/or braking components of reaction, while still maintaining the operation of the engine at full power and available for redirection to provide normal forward thrust, if desired. A slow moving aircraft and fast running engine are thus made possible by the deflection of the jet stream.

5. (a) Three embodiments for controlling the direction of the output combustion gases from a jet engine are disclosed and illustrated. The embodiment shown in Figs. 1 and 2 employs a baffle D for diverting at least a portion of the combustion gases from the normal rearward direction of flow in jet tube C into conduit E, and thence into pivotably mounted conduit H. Conduit H may be pivoted through a range of about 40° in order to vector combustion gases either forwardly (for braking) or downwardly (for additional lift).

(b) In the second embodiment (Figs. 3–5), the jet tube terminates in an elbow joint formed from a number of arcuate members constructed to nest together in order to form a curved conduit. This elbow joint deflects the combustion gases downwardly from their normal "straight through" rearward flow, to any point on an arc of 180°.

(c) The third embodiment (Figs. 6, 7) shows a jet engine A mounted in the wing of an aircraft. The longitudinal axis of engine A is transverse to the long axis or horizontal center line of the aircraft. The engine is provided with a conduit or tube C. In forward flight, the normal position of the jet tube C is directly rearward. By pivoting the tube C through any chosen degree in an arc of 0° to 110°, the direction in which the combustion gases are discharged may be varied.

(d) The first two embodiments utilize essentially three components:

(i) a jet tube through which the gases normally discharge for propulsion of the aircraft;

(ii) means for diverting the gases from their normal rearward direction; and

(iii) a movable conduit that receives the diverted gases and directs them to the desired direction.

In the embodiment of Fig. 6, all three components are combined into a single element, the pivotably mounted L-shaped conduit C.

6. The Douglas patent discloses a vectored thrust principle in which direction other than the normal rearward direction may be imparted to the thrust generated by the hot combustion gases from a jet engine.

7. In any airplane, it is important that the resultant of the jet thrust forces pass through or near to the center of gravity (c.g.) of the airplane. If, by vectoring the jet thrust, the resultant force passes to the rear of the c.g. of the airplane, a nosedown attitude will be imparted to the aircraft which, if not corrected, will cause the aircraft to nosedive. The need for the resultant forces to pass through the c.g. is particularly critical when a plane is operated in the VTOL mode because there is no airflow over the ailerons and rudder which would enable the pilot to use those controls to maintain the correct attitude of the airplane. This is less critical during STOL operation where there is airflow over the control surfaces.

8. The Douglas specification contains no mention of the relationship between the resultant of the vectored thrust and the center of gravity. During prosecution of the patent, Douglas attempted to amend his specification to include the statement that "the reactionary effect generated by the diversion of the jet should pass through the proximity of the center of gravity of the aircraft." The examiner required cancellation of this statement, holding that it was new matter, and Douglas did not contest that requirement. The examiner did permit Douglas to insert a claim (claim 8) that calls for the reaction of the vectored jet to pass "through a point between the leading and trailing edges of the wing." However, that point is not necessarily coincident with the center of gravity which, in conventional aircraft, is normally located at the quarter chord of the wing.

9. The embodiments of Figs. 1 and 3 of the Douglas patent do not show the resultant force as passing through the center of gravity of the aircraft. The embodiment of Fig. 6 does illustrate an arrangement in which the resultant force acts near the center of gravity. Figs. 1 and 3 employ a double 90° bend for the gases; Fig. 6 has a single 90° bend.

10. Each of the disclosed embodiments could, with appropriate balancing of forces and suitable controls, be used both in the VTOL and STOL modes.

Sufficiency and operativeness of the disclosure

11. The patent in suit discloses a workable arrangement for directionally controlling the jet thrust and one that would be understood by those ordinarily skilled in the art. Those in the art would understand that, to achieve a controllable aircraft, it would be necessary, in addition, to minimize pitching moments about the center of gravity of the aircraft created by varying the direction of the jet.

12. Douglas submitted his ideas to Vickers-Armstrong Ltd. in 1948. That company designed an airplane based on Douglas' idea. Although the airplane was never built, there is no evidence that the company had any difficulty in understanding the idea. None of the other companies or organizations to which Douglas disclosed his idea expressed any lack of understanding as to its operativeness or utility.

The scope and meaning of the claim

13. Claim 1, the only claim now asserted by plaintiff, provides as follows:

> Apparatus for controlling the reaction of a propelling jet in a rigid wing aircraft, comprising a jet tube mounted approximately parallel to the line of flight, means for diverting the flow of at least part of the combustion gases from the jet tube to cause them to move in a direction other than normal, a discharge conduit associated with the jet tube adapted for receiving the diverted gases, the discharge outlet of said discharge conduit being selectively movable about an axis in an arc of approximately 180°, in a plane substantially perpendicular to the plane of the wing for directionally controlling the discharge of gases from the conduit to effect, in at least one position

of the discharge conduit, a braking reaction on the aircraft.

14. (a) During prosecution of the patent, Douglas was required to make an election of species. Douglas elected the species of Figs. 1 and 2 wherein the discharge conduit is rotatable through a range of approximately 45°. Simultaneous with this election of species, Douglas presented claims which included the limitation that the discharge conduit be movable "in an arc of approximately 180°." Although the Examiner initially interpreted this limitation as calling for the jet tube to be movable in an arc, and rejected the claims as being misdescriptive, that rejection was withdrawn.

(b) Thereafter, Douglas continued to present claims containing the limitation "in an arc of approximately 180°" and continued to assert that that limitation was applicable to an arrangement such as shown in Figs. 1 and 2. Nowhere in the file wrapper history is there any indication that the Examiner either failed to understand the broad interpretation that Douglas placed on this limitation or disagreed with that interpretation.

(c) The species of Figs. 1 and 2 remained the elected species throughout the prosecution of the Douglas patent. The file wrapper history shows that the phrase "in an arc of approximately 180°" was intended to cover the species of Figs. 1 and 2 wherein the range of movement was no more than 45°.

(d) The meaning to be attributed to the phrase "in an arc of approximately 180°" is that the discharge outlet is movable within an arc of no greater than 180° to accomplish the claimed function. Any discharge outlet that is movable through an arc of up to 180° comes within the scope of this limitation.

(e) The limitation that the discharge outlet is movable "in a plane substantially perpendicular to the plane of the wing" was inserted in the claim to distinguish it from the arrangement shown in Gazda Patent No. 2,486,272 wherein a reaction jet was movable in a plane parallel to a helicopter blade.

(f) The "normal direction" referred to in claim 1 refers to the direction in which the gases issuing from a jet tube would

normally flow in propelling an airplane, *i.e.*, in a direction opposite to the forward line of flight.

The scope and content of the prior art

15. The first flight of a jet-propelled aircraft occurred in 1939. However, the use of gas turbines as a jet engine for propelling aircraft was suggested long prior to that time. One such early suggestion is contained in British Patent No. 118,123, issued in 1918. The British patent to Whittle (No. 347,206), issued in 1930, marks the practical beginning of the efforts to produce an operational jet airplane.

16. Almost from the very inception of jet propulsion as a means for propelling an airplane, it was realized that the jet thrust also could be used for braking, lift, or control of an airplane. The British patent to Harris (No. 118,123) and the patents to Anxionnaz (No. 2,396,911), Meyer (No. 2,420,323), and Lysholm (No. 2,280,835), all disclose, broadly, the concept of vectoring, or directionally controlling, the hot gases of a jet engine. The patents to Harris and Lysholm specifically disclose the use of a vectored jet thrust either to impart lift or to provide a braking reaction on the aircraft. The Higby patent (No. 1,704,895) discloses the concept of vectoring cold air from a centrifugal fan for imparting lift to an airplane. The patents to Anxionnaz and Meyer, as well as the text GAS TURBINES AND JET PROPULSION FOR AIRCRAFT by Smith, disclose the concept of deflecting the jet to assist in maneuvering the aircraft. Vectoring of the gases in both Higby and Lysholm, as well as in the early patent to Valdez (No. 1,629,767), was accomplished by passing the gases through two bends.

17. Various techniques for deflecting or vectoring the jet thrust were known prior to the Douglas patent. One technique was the use of shutters or flaps (Anxionnaz); another was the use of fixed conduits and flow control valves (Lysholm); still another was the use of a swivelling nozzle (Smith text, Plaintiff's Exhibit 24A); a further technique was pivotably mounting the jet tubes (Harris); another was the use of pivotally mounted L-shaped conduits (Higby; Valdez).

18. The patents to Anxionnaz, Lysholm, Meyer, and Valdez were cited by the Patent Office during prosecution of the Douglas patent. The Harris and Higby patents were not cited.

19. The manner in which the jet tubes in the Harris patent would be pivoted is ambiguous. Although suggesting the use of trunnions as pivots for the jet tubes, it is unclear whether the tubes would pivot independently of the remainder of the engine or the engine would pivot with the tubes.

20. The use of pivotably mounted conduits for directionally controlling the discharge of gases, with the conduits being selectively movable about an axis in a plane substantially perpendicular to the plane of the wing, is disclosed in both the Harris and Higby patents.

21. By late 1943 and early 1944, jet airplanes had been designed, built, and flown in this country. By October, 1945, the field of jet propulsion had become a specialized part of the larger field of aircraft powerplants. The level of skill of those working in that specialized field as of that date was relatively high.

Differences between prior art and claim 1

22. (a) Claim 1 does not require that the jet engine remain stationary. The claimed concept of diverting combustion gases in an arc to effect, in at least one position, a braking reaction on the aircraft is disclosed in the Harris patent. The combination of claim 1 differs from Harris only in the specific mechanical means employed to divert the combustion gases through the desired arc. In particular, Harris does not disclose any means for diverting the gases from the jet tube; rather, Harris would direct the gases by pivoting the jet tube itself, a concept similar to Fig. 6 of the Douglas patent. In fact, to the extent claim 1 is readable on Fig. 6, it is also readable on the Harris patent.

(b) The combination of claim 1 differs from Higby only in the type of propelling jet employed and the degree of rotation of the discharge conduit. Higby contemplates the use of cold air instead of hot combustion gases; nor does Higby

contemplate pivoting the discharge conduits to a forward position to impart a braking reaction. Higby discloses the same essential combination of elements for directionally controlling the propelling jet as that employed in the Douglas patent and the accused aircraft, *i.e.*, (i) a means for diverting the flow, (ii) a discharge conduit for receiving the diverted gases, and (iii) means mounting the discharge conduit for pivoting movement about an axis in a plane substantially perpendicular to the plane of the wing. As in Douglas, the gases in Higby would pass through two 90° bends.

Other considerations bearing on validity

23. (a) Based on Douglas' ideas, Vickers-Armstrong proposed an airplane in which the jet thrust could be deflected up to 60°. In order to obtain the proper balance of forces and avoid the introduction of pitching moments about the c.g. when the jet was deflected, very substantial modifications in the airplane were proposed. Even then, the airplane would have had no VTOL capability. This proposal did not progress beyond the preliminary design stage.

(b) It was not until the advent of the light weight gas turbine engines having a high thrust-to-weight ratio that it became apparent that rigid-wing aircraft with V/STOL capability could be built. Starting in about 1952, essentially four approaches were taken by the industry: tilt thrust (the wings and/or the engines are tilted to direct the thrust in the desired direction); augmented thrust (lift fans are driven by the engines to generate the lift); dual propulsion (separate engines for lift and for propulsion are used); and vectored thrust (represented by the accused airplanes).

(c) Development in the United States was concentrated in areas other than vectored thrust. By 1969, some 12–15 development programs, at a cost of millions of dollars, had been undertaken in the United States in an attempt to produce a satisfactory V/STOL airplane. None of those programs was successful in terms of producing a usable aircraft.

(d) A fundamental problem in vectoring the thrust of a propelling jet is in maintaining the controllability of the

airplane as the direction of the thrust is varied. Those in the art recognized that directional control of the thrust could be achieved without adversely affecting the trim so long as the resultant force always passed through or near to the center of gravity; however, as indicated by the substantial modifications proposed by Vickers-Armstrong in the hope of accomplishing this goal, this was difficult to achieve. Douglas' only suggestion for achieving this critical relationship is contained in Fig. 6 where the engine is located transversely of the airplane, approximately in line with the c.g. of the aircraft; however, the transverse mounting of the engine is impractical.

(e) The British-made Kestrel and Harrier aircraft, using the vectored thrust principle, are the only usable V/STOL aircraft that have been developed and built to date. Approximately 2.5 million technical man hours, at a cost of approximately $70 million, were expended in developing the Pegasus engine used in the Kestrel aircraft. Although Douglas did disclose his ideas to the builder of the Pegasus engine, there is no evidence that any use was made of that disclosure.

ULTIMATE FINDINGS AND CONCLUSIONS

1. The specification of the Douglas patent contains a written description of the invention in sufficiently full, clear, concise, and exact terms as to enable any person skilled in the art to make and use the same.

2. The invention described in the Douglas patent is operative and possesses utility.

3. The differences between the subject matter of claim 1 and the prior art are such that the subject matter as a whole would have been obvious in October, 1945 to a person having ordinary skill in the art.

CONCLUSION OF LAW

Upon the foregoing findings of fact and opinion, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiff is not entitled to recover, and plaintiff's petition is dismissed.

Appendix

Patented June 17, 1952 2,601,104

UNITED STATES PATENT OFFICE

2,601,104

JET PROPULSION AND CONTROL MEANS THEREFOR

Aubrey Douglas, Saltford, England

Application September 19, 1946, Serial No. 695,839
In Great Britain October 15, 1945

8 Claims. (Cl. 244—12)

1

This invention relates to jet propulsion for aircraft and is particularly concerned with a method of and means for controlling the propulsive effort created by the efflux or jet whereby a reverse action is obtainable.

According to the invention, a method of controlling the reaction jet of a jet propelled or partially jet propelled aircraft consists in baffling or reducing the effective area of the jet nozzle and/or diverting partially or otherwise the combustion gases in a direction other than the normal direction of flow.

It is to be understood the aforesaid method is additional to the normal means of controlling the efflux.

The invention also comprises means for baffling the efflux from a jet nozzle or for reducing the effective area of said nozzle and diverting the combustion gases, by means, for example, of ducts or conduits, in a direction other than that of their normal flow whereby the reaction created may be utilized for braking purposes, for assisting take off or landing or other control purposes.

In order that the invention may be clearly understood and readily carried into effect, reference is directed to the accompanying drawings, wherein:

Fig. 1 illustrates diagrammatically in plan view partly in section, a part of an aircraft wing embodying the invention.

Fig. 2 is a section on the lines 2—2, Fig. 1, looking in the direction of the arrows.

Figs. 3, 4, 5 illustrate a side elevation, a longitudinal section and a cross-section along the line 11—11 of Fig. 4 respectively of a modified form of a diversion means according to the invention.

Fig. 6 is a plan view of a wing and part of a fuselage of a jet propelled aircraft showing an application of the invention thereto and embodying a modified form of the invention.

Fig. 7 is a section on the line 13—13, Fig. 6.

The drawings are essentially diagrammmatic and the same reference characters are used throughout the figures for the same or equivalent parts.

The form of the invention illustrated in Figs. 1 and 2 of the drawings is applied to an aircraft in which a jet propulsion unit A is mounted in a wing B and consists is disposing in the main jet tube C, a baffle or diaphragm D associated with means (not shown on drawings) whereby it may be gradually introduced into the gas stream or closed thereon to divert its force, the cross-section of the jet tube being suitably shaped to receive the baffle. The combustion gases so diverted are lead by one or more ducts or conduits E, each having an outlet F to the inlet G of a discharge conduit H, the outlet J for the said conduit H pointing in any required direction, for example, forward and/or downward for the purpose of checking the speed of the aircraft or increasing its lift.

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The outlet J of the conduit H is directionally controlled so that the resultant force thereof will act in the plane or in planes parallel to the plane of symmetry of the aircraft, so that the diverted gases may be directed towards the ground and forward or backward as required for increasing the lift at braking or taking off respectively as illustrated in Fig. 2. For this purpose, the conduit H is mounted in bearings K, L, a trunnion M integral with the conduit H resting in the bearing K and the inner end of the conduit H being mounted in the bearing L. In order to rotate the conduit H along its path of movement, a pinion N is secured to the inner end of the conduit H, a suitable means being furnished to actuate the said pinion to effect the required disposition of the conduit H.

The conduit E may be lead straight into the conduit H or as an optional feature as shown in Fig. 1 of the drawings, the inner end G of the conduit H may be splayed to receive the outlet end F of the conduit E, thus introducing an ejector drawing air, for example, from a boundary layer into the chamber O and from there into the conduit H. The conduit H is normally housed within the wing structure, the lower face of which is fitted with doors P which are dropped when it is desired to bring the conduit into position for operative purposes. The outlet J of the conduit may be furnished with a closure Q.

The invention is applicable to all forms of jet propulsion units whether mounted in the aircraft wings or in the fuselage of an aircraft, the ducts or conduits being disposed in the most suitable position in relation to the propulsion unit subject to the inlets being arranged in the discharge conduit and the outlet in such a position as to create a rectionary effort, whether directed in axial opposition to the normal jet flow or at an angle thereto, the resultant force being utilized as a means of control.

Figs. 3, 4, 5 show a modification of the invention in which the jet nozzle C has an elbow joint Q formed of a number of members which are capable of nesting together to form a through conduit (see Fig. 4) or being diverted by concerted or independent operation as shown in Fig. 3 to

Appendix

2,601,104

give a discharge in the reverse direction or in a direction determined by a path of 180° in a plane or in planes parallel to the plane of symmetry of the aircraft through which the nozzle can be turned.

The elbow joint Q comprises four members Q^1, Q^2, Q^3, Q^4, of which Q^1 and Q^4 are fixed to the jet nozzle elements H and C, respectively, permitting the intermediate members Q^2 and Q^3 to be independently operated to an open position to enable quick recovery of the normal jet flow to a comparatively straight line course. Further, all or one of the members Q^1, Q^2 and Q^3 may be slotted to permit partial flow of the gases to reduce the initial pressure at the outlet of the nozzle and obtain a smooth braking effect when the nozzle is brought into use. In effect the elbow constitutes a valve controlling the gas flow. The jet nozzle conduit may also be reduced to provide a Venturi portion as at Q^5 to which inlets Q^6 are made from any suitable surface of the aircraft.

Figure 5 indicates diagrammatically a method of operating the several parts of the elbow. In this figure Q^1 is fixed to the conduit H and operable therewith, Q^2 is secured to a sleeve Q^7, and Q^3 to a shaft Q^8, the member Q^4 being free of the shaft and secured to the jet nozzle.

Figs. 6 and 7 illustrate an arrangement in which the jet propulsion unit A is mounted in a wing B transversely to the thrust and drag line, the nozzle C having an elbow part C^2 which is mounted in a pivotal bearing M such as described with reference to Fig. 1, the inlet end of the discharge nozzle being mounted for rotation in a gland R. The normal position of the discharge nozzle is as indicated in dotted lines in the Figs. 12 and 13, whereas the braking position of the discharge nozzle is indicated in full lines in these two figures. The outlet of the discharge nozzle is fitted with a diffusion cone C^3, this cone may be adjustable, for example, axially slidable or can be rectangular and provided with adjustable louvres.

Broadly speaking, the invention improves the controllability of jet propelled or partially jet propelled aircraft by two methods, one is to decrease the speed at which the machine is airborne, the other is to increase the lift whereby the machine becomes and remains airborne by diverting the normal jet flow to produce two thrust components, one reacting horizontally forward to induce a rearward braking reaction in the machine, the other acting vertically downwards and thereby generating an increased lifting force.

The invention may comprise any number or arrangement of ducts of any suitable cross-section or of variable cross-sectional area, whereby the velocity of the effluent in the conduits may be accelerated or retarded as desired.

Boundary layer tapping is particularly effective when the propulsion unit is running at full speed and is most required when the aircraft is travelling at a comparatively slow speed, for example, at landing; a slow running aircraft and a fast running engine is thus made possible by the deflection of the jet stream.

What I claim and desire to secure by Letters Patent is:

1. Apparatus for controlling the reaction of a propelling jet in a rigid wing aircraft, comprising a jet tube mounted approximately parallel to the line of flight, means for diverting the flow of at least part of the combustion gases from the jet tube to cause them to move in a direction other than normal, a discharge conduit associated with the jet tube adapted for receiving the diverted gases, the discharge outlet of said discharge conduit being selectively movable about an axis in an arc of approximately 180°, in a plane substantially perpendicular to the plane of the wing for directionally controlling the discharge of gases from the conduit to effect, in at least one position of the discharge conduit, a braking reaction on the aircraft.

2. Apparatus according to claim 1, wherein in at least another position of the discharge conduit, a braking and lifting reaction on the aircraft is effected.

3. Apparatus according to claim 1, wherein the discharge end of the discharge conduit is movable in a plane parallel to the plane of symmetry of the aircraft.

4. Apparatus according to claim 1, wherein the means for diverting the flow of at least part of the gases, is a valve.

5. Apparatus according to claim 1, wherein the discharge conduit is mounted for pivotal movement.

6. Apparatus according to claim 1, wherein the discharge conduit is mounted for pivotal movement and comprises an elbow joint formed of a number of members capable of nesting together.

7. Apparatus according to claim 1, wherein the discharge conduit is mounted within an aircraft wing structure and the outlet of said conduit, in controlled operative position, is at the under side of the wing structure.

8. Apparatus according to claim 1, wherein the reaction generated by the diversion of the jet passes through a point between the leading and trailing edges of the wing.

AUBREY DOUGLAS.

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Appendix

June 17, 1952 A. DOUGLAS 2,601,104

JET PROPULSION AND CONTROL MEANS THEREFOR

Filed Sept. 10, 1945 3 Sheets-Sheet 1

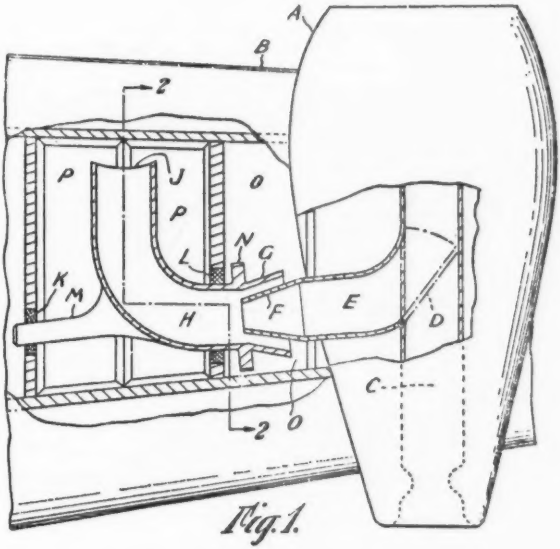

Fig. 1.

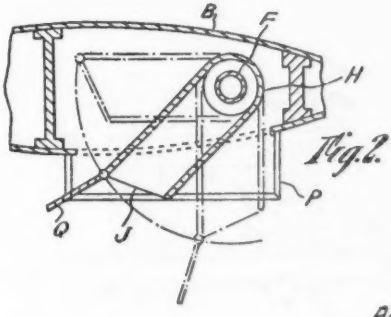

Fig. 2.

Aubrey Douglas
By Howson, Myers & Manley
Atty's

Appendix

June 17, 1952 A. DOUGLAS 2,601,104

JET PROPULSION AND CONTROL MEANS THEREFOR

Filed Sept. 10, 1946 3 Sheets-Sheet 2

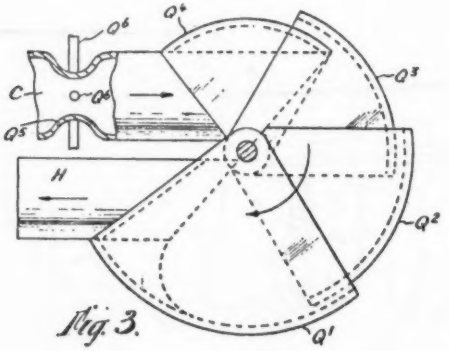

Fig. 3.

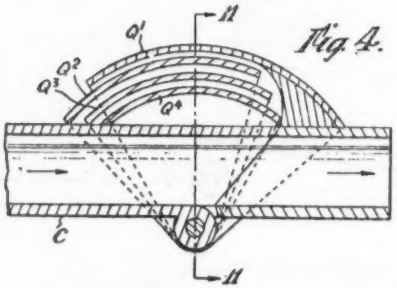

Fig. 4.

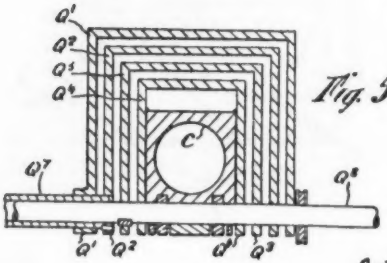

Fig. 5.

Aubrey Douglas
By Brown, Myers & Manley
Atty's

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June 17, 1952 A. DOUGLAS 2,601,104

JET PROPULSION AND CONTROL MEANS THEREFOR

Filed Sept. 10, 1946 3 Sheets-Sheet 3

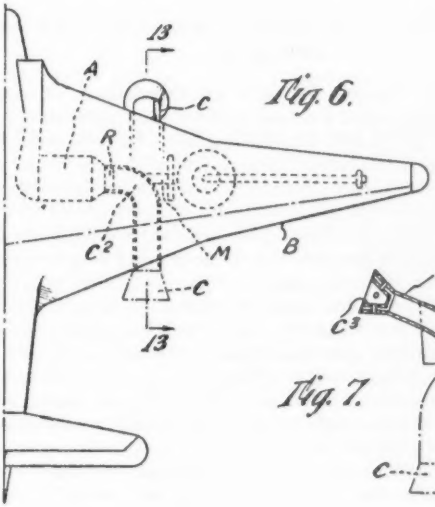

Fig. 6.

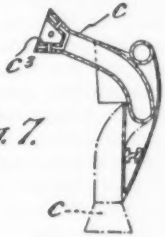

Fig. 7.

Aubrey Douglas
By Fraser, Myers & Manley
Attys

Syllabus

511 F. 2d 529

BETHLEHEM STEEL CORPORATION v. THE UNITED STATES

[No. 44–68. Decided February 19, 1975. Plaintiff's motion for rehearing and reconsideration denied March 28, 1975.]

ON PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

Contracts; Armed Services Procurement Regulations; increase in labor and material costs; weighted v. unweighted guidelines method of determining a fair and reasonable profit.—In 1954 plaintiff was awarded contracts for construction of five destroyers, the contracts requiring plaintiff to exclude from its cost estimates allowances for increases in labor and material costs but containing provision (Article 6) for escalation adjustments in price according to an agreed formula, except that the contracting officer could deny any upward adjustment if he found an adjustment unnecessary to return plaintiff a fair and reasonable profit. In 1954 there were no published guidelines for determining fair and reasonable profit, but subsequently "unweighted" guidelines were published and in 1963 these guidelines were superseded by "weighted" guidelines. The contracting officer denied all escalation costs but the ASBCA allowed a profit of 5% of costs. On plaintiff's suit here seeking an increase, the court held (191 Ct. Cl. 141, 423 F. 2d 300 (1970)), that the regulation as amended in 1963 providing for the use of weighted guidelines should have been considered by the Board as applicable to the dispute, citing its decision in *Newport News Ship. Co.* v. *United States*, 179 Ct. Cl. 97, 374 F. 2d 516 (1967), in which the court had determined that the Board should apply the then existing unweighted guidelines for determining a reasonable profit under the contract in issue. Shortly after the *Bethlehem* decision, the Navy legal member requested the ASPR Committee to make a "deviation" from the use of weighted guidelines as to those contracts awarded prior to 1963. The Committee decided that mandatory retroactive application of the weighted guidelines was not intended, particularly with respect to escalation clauses, that application thereof was not feasible and that they were intended only for negotiation of future contracts, and recognized that this decision would leave the unweighted guidelines in ASPR § 3–808 for application. On remand to the Board, the latter applied the non-weighted guidelines, and this decision is now under review. Plaintiff claims that it has a vested right to the weighted guidelines and that it was feasible to use such guidelines. The court points out that in its original *Bethlehem* decision while stating that plaintiff was entitled to use of the weighted guidelines method, defendant could make a retroactive change in the method. The court also points out that factors favoring retroactive application are the

Syllabus

long lapse of time under these contracts, between original award and final settlement, and the remedial effect of a guidelines regulation as against the assignment of a "roving absolutism" to a contracting officer in granting or denying escalation. For the reasons set forth, the court *holds* that the Board decision under review is not contrary to substantial evidence or to law and is not arbitrary or capricious, and under Wunderlich Act standards is affirmed. Plaintiff's motion for summary judgment is denied, defendant's cross-motion is allowed, and judgment is entered for plaintiff in the amounts determined by the Board under its original decision and the decision under review, with adjustment for any payments already made.

Contracts; regulations of contracting agency; applicability; generally.

[1] Whether, in the absence of express provisions, a procurement regulation can have retroactive application to a contract earlier awarded, is not to be decided by any wooden rule, but by reference to the character and intent of the contract and of the regulation involved.

United States ⇐ 73(12)

Contracts; Board of Contract Appeals; deviations in techniques of procurement; authority to make deviations.

[2] Members of the Armed Services Board of Contract Appeals are required to be "learned in the law" and can hardly be also expected to be so expert as not to need guidance as to the techniques of determining a contractor's reasonable profit under its contract. In determining the allowability of a price adjustment under a contract's labor and material escalation clause, the Board is not the proper body to initially decide whether weighted or unweighted guidelines (as the case may be) should be given mandatory retroactive application; this decision is properly made by the rule-making committee and is binding on the Board.

United States ⇐ 73(12)

Contracts; disputes; administrative decision; suspension of proceedings to obtain administrative relief.

[3] Unless the procedure of the Contract Appeals Board is inadequate, where the relief sought is relief which could be obtained under the contract, such as determination of the factual issue of the contractor's fair and reasonable profit under established guidelines, the court will suspend proceedings to permit the parties to have the matter determined by the Board, despite the Board's previous errors.

United States ⇐ 73(15)

Contracts; Armed Services Procurement Regulations; rule-making committee; ex parte communications.

[4] While *ex parte* approaches to agency heads may invalidate adjudicatory actions, absent a statute or regulation applicable to the Armed Services Procurement Regulations committee an approach

by one of its Navy members is not considered an invalidating *ex parte* communication.

United States ⟸ 73(9)

Contracts; Armed Services Procurement Regulations; retroactivity of; profit, fair and reasonable; guidelines—weighted v. unweighted.

[5] Where plaintiff deliberately entered into its 1954 defense contract which provided for reimbursement for any increase in labor and material costs, except that the contracting officer could deny any upward adjustment in whole or in part, but where plaintiff did not bargain for use of any method of determining a reasonable level of profit, the decision of this court in *Bethlehem Steel Corp* v. *United States*, 191 Ct. Cl. 141, 423 F. 2d 300 (1970), holding that plaintiff was entitled to have the Board use the weighted guidelines method of 32 C.F.R. § 3–808 as amended in 1963 (which superseded the unweighted guidelines method) in determining its labor and material escalation adjustment but also holding that even then defendant could make a retroactive change in the method, did not create a vested right in plaintiff to the use of the weighted guidelines method v. the unweighted guidelines method. The most plaintiff could demand was determination of its acceptable profit level by some fair and reasonable method, of general applicability, and not one freshly invented for its particular case.

United States ⟸ 73(12)

Contracts; Armed Services Procurement Regulations; profit, fair and reasonable.

[6] If a technique of determining a reasonable level of profit produces a result that shocks the sense of fairness or justice, use of it is not "feasible" and should be avoided.

United States ⟸ 73(12)

George Vradenburg, III, for plaintiff. *Albert R. Connelly*, attorney of record.

Howard G. Slavit, with whom was *Assistant Attorney General Carla A. Hills*, for defendant. *Steven J. Bercik*, of counsel.

Before DURFEE, *Senior Judge*, DAVIS, SKELTON, NICHOLS, KASHIWA, KUNZIG and BENNETT, *Judges*.

NICHOLS, *Judge*, delivered the opinion of the court:

This case of Wunderlich Act review of a contract dispute under Dispute Clause procedure (41 U.S.C. §§ 321–22) is now before us for the third time. On the first occasion, 191

Ct. Cl. 141, 423 F. 2d 300 (1970), we held that the Armed Services Board of Contract Appeals (ASBCA) had erred as a matter of law in not following certain Armed Services Procurement Regulations (ASPR) we considered applicable to the dispute. After Board preliminary proceedings reported at 71–1 BCA ¶8640, Bethlehem on May 10, 1971, applied to us for an order terminating stay and for other relief. This we denied in an unreported order, without opinion. The Board proceedings then resumed and resulted in the decision now under review, 73–1 BCA ¶9898. We affirm.

Our 1970 decision details the controversy as it had evolved up to that time and we need not repeat it all here. Briefly, Bethlehem had built five Navy destroyers under two fixed price contracts, Nobs-3556 and 3648, both of which contained clauses allowing for labor and material escalation, but enabling the Contracting Officer to deny any upward adjustment thereunder in whole or in part, if he found that it was not required to enable the Contractor to earn a fair and reasonable profit under the contract, Art. 6, Par. (e). After full performance, plaintiff claimed $3,347,000 escalation under Nobs-3556 and $2,404,900 under Nobs-3648. The latter claim has now been allowed by the Board in its entirety and having been dismissed is not before us for review. The original Board decision allowed $1,064,151 under Nobs-3556 making a total profit of 5% of costs. The Board's theory was that plaintiff had agreed to a limit of 5%. We were unable to find evidence of agreement to that limit. Further, the Board had determined the level of reasonable profit without reference to the published guidelines of the Department of Defense which told how contract clauses limiting contractors to reasonable profit levels (hereinafter, profit limitation provision) were to be interpreted and applied.

In *Newport News Shipbuilding & Drydock Co.* v. *United States*, 179 Ct. Cl. 97, 374 F. 2d 516 (1967), we had already held that in making a profit limitation decision under a Navy contract clause of the same type, the Board had erred in not following published guidelines. On retrial, the Board, as we indicated it should, followed the guidelines enacted after the contract date and before its original decision, hereinafter called the "unweighted guidelines." It allowed Newport News

full escalation, 71–1 BCA ¶8705. The case was settled on that basis. In *Bethlehem*, the fact appeared that the Department of Defense had superseded the original "unweighted guidelines" with so-called "weighted guidelines", after the original Board decision in *Newport News* and before that in *Bethlehem*.

Plaintiff in *Bethlehem* argued for use of the "weighted guidelines" on retrial. Defendant seemed to argue for no guidelines at all, attacking the "weighted guidelines" as unsuitable for the Bethlehem contract even if required for most others. This was because, in defendant's view, the "weighted guidelines" would fail to allow weight for the fact the Navy had awarded this contract to Bethlehem, though it was a high bidder, to keep its Quincy, Massachusetts facility in the shipbuilding business. At that point, however, defendant indicated no preference for the "unweighted guidelines".

This issue caused us much concern. Since, in *Newport News* we had held a guideline regulation to apply to a contract written at an earlier date, when no guidelines existed, it seemed consistent that any further amending or superseding provisions should be applicable likewise, right up to the original Board trial on the facts. This would make the amended or "weighted guidelines" the proper ones to use in the Bethlehem retrial. What happens, however, if the guidelines are amended or modified again, between the original trial and retrial of the issue? In *Newport News*, apparently by mutual consent, the new guidelines were not given effect at the retrial and the Board used the ones it should have used at the original trial. It was nevertheless obvious to us that this was not the only possible answer.

The determination of a supposedly reasonable level of profit by administrative fiat after the event, and not by operation of the market place, is not an easy operation that anyone can perform. Without guidelines the power to do it confers, as we said in *Bethlehem I*, a kind of roving absolutism inimical to our institutions (p. 155). In the administration of our most widely used system of profit limitation under Government contracts, the Renegotiation Act of 1951, 50 U.S.C. (App.) § 1191 and ff., and its predecessors back to 1942, the need for guidelines has been recognized from the

beginning, almost, and they are provided both in statutory provisions and in regulations. 50 U.S.C. (App.) § 1213(e); 32 C.F.R. § 1460.1 and ff. The ASPR indicated a recognition of the same need, and we were understandably reluctant to believe there could be any profit limitation provisions in Department of Defense contracts, they were not intended to apply to. By the same token, new regulations, we would presume, reflected more extended experience with profit limitation, and would if applied to previously existing contracts, produce a more satisfactory result than previous regulations or no regulations at all. On the other hand, it certainly was possible the authors of regulations might be unaware at times of all the previously awarded contracts remaining unsettled, to which they might apply, and they might obtain unforeseen and undesired results. If this occurred, they should be free to correct their errors.

As we have recently held in *Hills Transp. Co.* v. *United States*, 204 Ct. Cl. 51, 492 F. 2d 1394 (1974) whether, in the absence of express provision, a procurement regulation can have retroactive application to a contract earlier awarded, is not to be decided by any wooden rules, but by reference to the character and intent of the contract and of the regulation involved. Here, factors favoring retroactive application are the long lapse of time under these shipbuilding contracts, between original award and final settlement, and the remedial effect of a guideline regulation, any regulation, as against the assignment of a "roving absolutism" to a Contracting Officer in granting or denying escalation.

In view of the foregoing considerations we deemed it unwise to nail defendant inescapably to the mast of the "weighted guidelines" method. While stating that as things were, plaintiff was entitled to use of that method on retrial, we held that even then, defendant could make a retroactive change in the method. Our words, as reported, were as follows:

* * * * *

> As we have said, we see no injustice or anomaly in applying profit limitation techniques, as the Pentagon may have amended and prescribed them from time to time, up to the date of the determination. We would presume that changes were intended to clarify and sim-

> plify, as well as to reduce the impact of subjective factors in the mind of the administering official. To some extent amendments may reflect earlier departures in actual practice, to a large extent no doubt they are the product of experience. If anything has been slipped in which would impair vested rights unless limited to prospective application only, let it be pointed out. If we have erred in thinking the "Weighted guidelines method" is feasible to apply to the instant contracts, the Pentagon even now could amend or supplement its regulation, and the Board would be bound, provided no impairment of vested rights was attempted. Any amendment purporting to reaffirm the position now claimed, that officials determining a reasonable level of profit under clauses such as Article 6(e) are not subject to any published guidelines whatever in certain cases, at least, would advisedly be made in light of the recent statement of the Supreme Court: "* * * a broad, roving authority, a type of administrative absolutism [is] not congenial to our law-making traditions." *Gutknecht* v. *United States*, 396 U.S. 295, 306 (1970). [191 Ct. Cl. at 154–55.]

It was express that the change should, if made, be in the regulations, and therefore by the rule-making arm of the Secretary of Defense, not his adjudicatory arm, the ASBCA. A change in the rules by the latter would be nothing but a reversion to the "do it yourself guidelines" and "seat of the pants navigation" we condemned in the *Newport News* decision and again in this. Members of the ASBCA are required to be "learned in the law" and can hardly be also expected to be so expert as not to need guidance as to the techniques of reasonable profit determination. If the rule-making body was to change the rules, it was implicit that body should follow its customary formalities in making rules, and receive the advice from within and without the Government that it normally would. Both the "unweighted guidelines" and the "weighted guidelines" afford internal evidence that the needed expertise exists within or is available to the Department of Defense. A third implicit requirement was that the purported "rule" should really have general application and not be just an attempt to influence a lawsuit. We referred to "The Pentagon" meaning that all bodies in or about that vast structure might perform in the roles appropriate to them under the organization of the Department.

What actually happened was put before us in Bethlehem's 1971 motion. It is assumed for purposes of this opinion that our denial of the motion did not establish a "law of the case" barring consideration now. The ground was unstated and it could have been on several grounds.

Shortly after our decision came down the Navy legal member put before the ASPR Committee, the rule-making committee having supervision over the ASPR, a request for a "deviation". Quoting parts of our decision, he advanced the Navy's position that the "weighted guidelines" were not intended to apply to contracts awarded, as Bethlehem's was, before 1963. The Committee decided, as recorded in its minutes, that mandatory retroactive application of the weighted guidelines was not intended, and particularly with respect to escalation clauses. Deviation was not required. The Committee also agreed application of the weighted guidelines was not feasible and they were intended only for negotiation of future contracts. A deviation was approved to the extent others might think the guidelines applied. In taking this action, the Committee recognized it would leave the unweighted guidelines in ASPR 3–808 for application. They were not considered as effecting a substantive change in the contract. The Navy member had listed ten contracts with unsettled escalation claims under similar clauses, to which the "deviation" would apply. This included the two Bethlehem contracts here involved. The Navy's reason for asserting unfeasibility appears to have been primarily that the "weighted guidelines" effectuated an objective that obtained in 1963 to attract more contractors to defense work. This need did not exist in 1954 when the Bethlehem contracts were awarded and the object was then to place contracts at the lowest possible prices.

The ASBCA subsequently held, correctly it would appear, that under ASPR 1–109.3, the Committee had authority to approve a "deviation" of this kind, provided it was unanimous, and a major policy was not involved. Both these conditions were satisfied. *See* also DOD Instr. 5126.3, December 20, 1961; Government Contract Reports § 825. It could have published a regulation or directive, without higher level approval, subject to those conditions.

The ASBCA considered it was bound by this "deviation" to apply the unweighted and not the weighted guidelines. It correctly read our decision as holding that it was not the proper body to make this kind of decision, and that one properly made elsewhere would bind it.

The Board, after trial, applying the non-weighted guidelines, awarded plaintiff full escalation under Nobs-3648, but only $687,840 additional escalation over the previous decision under Nobs-3556, being 6.3% of cost. The sum of $2,282,849 would have been required for full escalation, and the Board denied the excess of this figure over $687,840.

Plaintiff does not attack the Board's techniques in applying the unweighted guidelines, or rather its attack does not focus upon any variation between those techniques and one or more identified parts of the non-weighted guidelines themselves. In general, the Board appears to make a conscientious and reasoned effort to apply them fairly. Plaintiff says it has a "vested" right to the "weighted guidelines" and under them would recover full escalation as a mathematical certainty. We are not so sure as to that but defer to the Pentagon's experts who, as plaintiff notes, themselves believe such guidelines would produce substantially higher results, at least.

If defendant wanted to use the unweighted guidelines, it is regrettable it did not so inform us in 1970. To have disposed of all Art. 6(e) escalation claims by a uniform method would have had advantages apparent to any mind, and the method was already in use for *Newport News*. Any benefit from future advances in profit control technique could have been sacrificed in the circumstances. Nor did defendant tell us then that the weighted guidelines were purposely inflated to attract more bidders. We also deplore the failure to inform Bethlehem of the contemplated change in the rules. There are certain amenities normally to be expected in the conduct of litigation. To obtain *ex parte* a change in the ground rules and present them to the adjudicating tribunal as *fait accompli* and binding on it, will not impress the ordinary mind as entirely cricket. However, our problem is whether to react only to clear cut and demonstrated illegality, or whether to allow our sense of undirected outrage to prolong this already inordinately prolonged litigation, to the advantage of no one

knows whom. In the case of the Government, we realize that the right hand often does not know what the left hand does. Actions are taken that are, in the aggregate, outrageous, yet may be quite innocent in the minds of the individual actors.

We cannot make our own determination of a reasonable profit level in view of our holding in *Newport News* that the issue is factual, and our obligation to leave factual issues to Board determination despite previous errors, unless the Board procedure is inadequate and unavailable. *United States* v. *Anthony Grace & Sons*, 384 U.S. 424 (1966). The slow progress of this case does not seem imputable to the Board so much as to the novelty of the issues and the complexity of the case. If the job of determining a reasonable profit level has to be done all over again, it is the Board that must do it.

The "unweighted guidelines" used here were considered and approved by us in the *Newport News* case *supra*. No contention is made that these guidelines are not fair and reasonable, of themselves. In plaintiff's eyes, they are just not as productive of a high level of reasonable profit as the preferred set. As a matter of fact the "unweighted guidelines" bear a strong family resemblance to the Congressionally enacted set in the Renegotiation Act, *cit. supra*. In adjudicating *Bethlehem* I, we formed the impression the Department of Defense had abandoned them as unsatisfactory, but this is now shown to have been erroneous. The "weighted guidelines" were put in effect for wholly different reasons, as has appeared above.

Plaintiff's serious legal attack on the Board decision has three main heads: (1) the alleged *ex parte* approach by the Navy member to the ASPR Committee, (2) that Bethlehem has a vested right in use of the "weighted guidelines" method, and (3) that it was "feasible" to use those guidelines.

1. As a matter of law, this court has often regarded *ex parte* approaches as invalidating adjudicatory actions. *Camero* v. *United States*, 179 Ct. Cl. 520, 375 F. 2d 777 (1967); *Jarett* v. *United States*, 195 Ct. Cl. 320, 451 F. 2d 623 (1971). However, it has not attempted to apply the same standards to rule making. Everyone knows that an *ex parte* approach may lie behind many a statute. When we indicated

therefore, that a change in the rules must originate in a rule making body, we indicated that such a change might be effected by the procedures normal to such bodies. Plaintiff has not cited a statute or regulation applicable to the ASPR Committee, invalidating an *ex parte* approach by one of its members. We wonder if an approach to an organized body by one of its own members can ever be deemed *ex parte* in the pejorative sense of the word.

2. Plaintiff also says it had a vested right in the use of the "weighted guidelines" procedure. This echoes a provision in our former opinion, quoted above, intimating that in changing its regulation, the defendant could not impair vested rights. Where does the alleged vested right of the plaintiff originate? Not in the contract, wherein plantiff did not bargain for use of any method of determining a reasonable level of profit in case Art. 6(e) had to be administered. Not in the regulation itself, since our reading of it makes it inherently subject to change, unless the change impairs vested rights of other origin. Not in our former decision. We are not empowered to create vested rights against the Government except in the form of money judgments. Such rights might come into being as *res judicata*, collateral estoppel, or "law of the case", but we see none of these here. There has been no final judgment to give rise to the first two, and as to law of the case, it works against plaintiff if at all, insofar as our "law of the case" stated in *Bethlehem I* was purposely hedged, and plaintiff's contention just comes back to depend on plaintiff's interpretation of that decision, which we reject.

The irreparable flaw in plaintiff's claim to a vested right in the "weighted guidelines" is that in 1954 plaintiff deliberately made contract Nobs-3556, including Art. 6(e). If Art. 6(e) subsequently came up for implementation, the most plaintiff could demand was determination of its acceptable profit level by some fair and reasonable method, of general applicability, and not one freshly invented for its particular case. This has now been accorded to it.

3. Plaintiff also says it would be "feasible" to apply the "weighted guidelines" echoing our language that these guidelines might be changed if it were not "feasible" to use them. Plaintiff also says use of these guidelines leads inexorably

to allowance of its entire escalation claim without deduction. The Board in response quotes dictionary definitions of "feasible" as "possible" or "practicable" or "capable of being done", and other definitions as what is "suitable" or "reasonable". It concludes, correctly, that we intended the broader meaning. The paragraph taken as a whole, indicates that a general change in the regulations made for any legitimate reason is acceptable. "Unfeasibility" of the prior regulation is merely an example. We regret having used such an ambiguous terminology. In the area of profit limitation the subjective cannot be avoided entirely. If a technique of determining a reasonable level of profit produces a result that shocks the sense of fairness or justice, use of it is not "feasible", and should be avoided.

The Board also points out, correctly, that the major premise of *Bethlehem* I decision was our objection to decision of profit limitation issues under Art. 6(e) of the involved contracts, by the use of do-it-yourself or seat-of-the-pants guidelines. A minor premise was the belief, right or wrong, that the regulations provided proper published guidelines for all cases, and the conclusion, that such published guidelines should be followed. As the Board points out, use of the "unweighted guidelines" per rule adopted under the ASPR constitution, implements, rather than violates, every significant part of our decision. Had we known they wanted to use the "unweighted guidelines" we would probably have expressed our approval. We may have thought matters would be handled differently than they were, in some respects, but we did not frame a mandate to demand all that we expected. Indeed, to describe our opinion as a mandate at all is an exaggeration. In 1970 we did not have the power to tell the Board what to do, that we now have under 28 U.S.C. § 1491, as amended by Pub. L. 92–415. The Board suspended the case to allow plaintiff to apply to this court when it declared its dissatisfaction with the guidelines to be followed. It did more than the law then required of it, to ascertain our wishes and apply them. Our so-called mandate was in reality, and was intended, more as a summary of the legal options open to defendant on the retrial of the case.

In view of the foregoing, the Board decision under review is not contrary to substantial evidence, is not contrary to law, and is not arbitrary or capricious. By Wunderlich Act standards, it must therefore be affirmed.

Plaintiff's motion for summary judgment is denied. Defendant's cross motion for summary judgment is allowed. Judgment is entered for plaintiff in the amount determined by the Board, which was for Contract Nobs-3556, $1,064,151 under the original decision and $687,840 additional under the decision now under review, or a total of $1,751,991, with adjustment for any portion of the said sum already paid.

BENNETT, *Judge*, dissenting:

During the year 1954, plaintiff was awarded two contracts, Nobs-3556 and Nobs-3648, for the construction of three destroyers and two destroyers, respectively. Plaintiff was not the low bidder for the Nobs-3556 contract, but was awarded the contract nevertheless in pursuance of the Government's policy of continuing the existence of an essential defense facility. Plaintiff was the only shipbuilder asked to submit a proposal for Nobs-3648, and, on the same policy ground, was awarded that contract as well.

Both contracts contained provisions requiring the contractor to exclude from its cost estimates any contingency allowances intended to offset anticipated increases in labor and material costs during the period of construction. In return, the Government promised to reimburse the contractor, according to an agreed formula, for any increases in labor and material costs which ultimately occurred during that period, except as limited by the following Article 6(e) of the contracts:

> (e) The Contracting Officer may deny, in whole or in part, any upward adjustment in the contract price required under this Article if the Contracting Officer finds that such adjustment is not required, in whole or in part, to enable the Contractor to earn a fair and reasonable profit under this contract.

When plaintiff entered into the contracts at issue, there were no published guidelines for determining "fair and reasonable profit" in a given case. Sometime prior to August 1963 the

Department of Defense published "unweighted" guidelines, and in August 1963 those unweighted guidelines were superseded by the "weighted" guidelines method of determining reasonable profits. 32 C.F.R. §§ 3.808–1 *et seq.* (1965).

When plaintiff's contracts were completed (the last of the five destroyers was delivered on February 26, 1958), plaintiff sought from the contracting officer labor and material escalation costs of $3,347,500 on Nobs-3556 and $2,404,900 on Nobs-3648. In neither case was the amount of the escalation costs in dispute, but the contracting officer refused to permit recovery of any of those costs on the basis that such adjustment was unnecessary "to enable the Contractor to earn a a fair and reasonable profit." Article 6(e), *supra.* If the decision of the contracting officer had stood, plaintiff's profit on the two contracts would have been 3 percent and 2.3 percent of cost, respectively; the full escalation sought by plaintiff, on the other hand, would result in profit margins of 9.3 percent and 9.6 percent.

Plaintiff's appeal to the ASBCA from the contracting officer's decision was partially successful, the board awarding plaintiff that portion of escalation costs which brought its profit margin on both contracts to 5 percent of cost. Though the weighted guidelines were in effect at the time of the board's decision, the board did not use them or refer to them.

Plaintiff appealed to this court from the ASBCA decision. The result was the court's opinion in *Bethlehem Steel Corp.* v. *United States*, 191 Ct. Cl. 141, 423 F. 2d 300 (1970), which is hereafter referred to as *Bethlehem I.* In that opinion the court recalled that in an earlier case with very similar facts,[1] it had applied the existing Department of Defense regulations which set out unweighted guidelines for determining a reasonable profit margin, to a contract entered into prior to the effective date of those regulations. It followed that in *Bethlehem I* plaintiff was also entitled to application of the existing regulations, *i.e.*, the weighted guidelines, and the court so held (with a reservation to be discussed, *infra*):

> * * * Plaintiff desires to take its chances under the "Weighted guidelines method" and it has a legal right to do so. [191 Ct. Cl. at 154, 423 F. 2d at 307.]

[1] *Newport News Shipbuilding & Dry Dock Co.* v. *United States*, 179 Ct. Cl. 97, 374 F. 2d 516 (1967).

Indeed, even defendant in *Bethlehem I* accepted the general principle that the weighted guidelines should apply to contracts entered into prior to the regulation's effective date:

> * * * Defendant does not now deny that it [the regulation setting out the weighted guidelines] would govern most decisions limiting or refusing otherwise justified labor and material escalation under Article 6(e), and there is nothing in it [the regulation] that suggests an intent to narrow the former scope. * * *. [191 Ct. Cl. at 150, 423 F. 2d at 305.]

Defendant argued in *Bethlehem I*, however, that plaintiff should be an exception to the rule because plaintiff had been awarded the shipbuilding contracts in spite of the fact that other contractors could have built the ships at lower cost, and in order that plaintiff would not close down its facilities. In rejecting this argument, the court noted, first, that the desired exception was not to be found in the regulation and had "every earmark of having originated in the active mind of defense counsel."[2] The court also rejected defendant's assertion that the parties had agreed to a profit level of 5 percent in consideration of plaintiff's being awarded the contract, and that the weighted guidelines would result in a higher, unintended level of profits:

> * * * The alleged agreement to a 5% level, in a contract that viewed prospectively could have resulted in anything from a loss to a windfall profit level, according to its terms, must be regarded as located in defendant's counsel's eyes alone. [191 Ct. Cl. at 152, 423 F. 2d at 306.]

After its determination that plaintiff had a "legal right" to application of the weighted guidelines, however, the court added the following comments:

> As we have said, we see no injustice or anomaly in applying profit limitation techniques, as the Pentagon may have amended and prescribed them from time to time, up to the date of the determination. We would presume that changes were intended to clarify and simplify, as well as to reduce the impact of subjective factors in the mind of the administering official. To some extent amendments may reflect earlier departures in

[2] 191 Ct. Cl. at 151, 423 F. 2d at 305.

Dissenting Opinion by Judge Bennett

> actual practice, to a large extent no doubt they are the product of experience. If anything has been slipped in which would impair vested rights unless limited to prospective application only, let it be pointed out. If we have erred in thinking the "Weighted guidelines method" is feasible to apply to the instant contracts, the Pentagon even now could amend or supplement its regulation, and the Board would be bound, provided no impairment of vested rights was attempted. * * *. [191 Ct. Cl. at 154, 423 F. 2d at 307.]

Seizing upon the above comments, which the majority now identifies as an option open to defendant on retrial of the case, the Navy promptly requested from the ASPR committee a "deviation" from the use of weighted guidelines with respect to plaintiff's contracts and eight other shipbuilding contracts. The ASPR committee granted the deviation, stating that application of the weighted guidelines to contracts entered into prior to the effective date of the regulation is not feasible, since the weighted guidelines effect a substantive change in the standards existing at the time the contracts were entered into and were intended for the development of a profit objective for negotiation of future contracts. In lieu of the weighted guidelines, the ASPR committee prescribed application of the superseded unweighted guidelines to plaintiff's contracts.

Defendant was successful in convincing the ASBCA to follow the ASPR committee's "deviation" and thus to apply the unweighted guidelines. In doing so, the ASBCA ruled that plaintiff was entitled to full escalation on the Nobs-3648 contract, but only partial escalation (to a 6.3-percent profit margin) on the Nobs-3556 contract. Plaintiff is convinced, and defendant's actions seem to confirm the fact, that if the ASBCA had used the weighted guidelines rather than the unweighted guidelines, plaintiff would have recovered virtually all of the escalation under the Nobs-3556 contract. Plaintiff thus requests that this court reaffirm its statement in *Bethlehem I* that plaintiff has a "legal right" to application of the weighted guidelines.

The issue presented for decision here is easily stated. Has defendant shown that the weighted guidelines method is not "feasible" to apply to the contract at issue? If not, then plain-

tiff has a legal right to its application. It is my belief that the weighted guidelines are entirely feasible to apply and that plaintiff should receive the benefit of their application. I would remand to the board for that purpose.

The term "feasible" has, of course, more than one meaning. As Judge Nichols indicates, it can mean "possible" or "reasonable" or "suitable." There can be no dispute that it is possible to apply the weighted guidelines to plaintiff's contracts. In fact, both plaintiff and defendant are able to anticipate what the approximate result of such an application would be. Furthermore, it would not be "unreasonable" to apply those guidelines in the sense that their use would result in an unusual or absurd result, or as Judge Nichols states, one that "shocks the sense of fairness or justice." Rather, it appears that if they were used appropriately in the manner demonstrated in some detail by the court in *Bethlehem I*, the result would be an indicated profit margin for plaintiff of between 9 percent and 12 percent. The maximum profit plaintiff can receive from escalation here is 9.3 percent, in any event.[4]

Defendant has suggested three reasons why the use of weighted guidelines is "unsuitable," if we are to use this as the definition of the word "feasible." I will deal with them in turn.

First, defendant states that it is desirable that all shipbuilding contractors whose contracts contained Article 6(e) should have the reasonableness of their profits determined by the same method—namely, unweighted guidelines. But there is no inherent reason why this should be so. We were aware in *Bethlehem I* that the unweighted guidelines had in all likelihood been applied in the *Newport News*, *supra*, contract, and others. We nevertheless stated that plaintiff was entitled to the benefit of the *existing* regulation specifying weighted guidelines. It was presumed that the weighted guidelines represented an improvement over the earlier method, particularly because they reduced the "impact of subjective factors in the mind of the administering official."[5]

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[4] Other shipbuilding contractors received escalation, even though such escalation brought profit levels to 15.2 percent, 15.32 percent, and 10.1 percent in three instances.

[5] 191 Ct. Cl. at 154, 423 F. 2d at 307.

Moreover, defendant's interest in consistency was not apparent in *Bethlehem I* wherein defendant argued that *no* guidelines should be applied to determine the reasonableness of plaintiff's profits. It seems that defendant desires consistency of treatment only when it sees some advantage to itself arising therefrom.

The second of defendant's arguments with respect to feasibility is that the greater profits which plaintiff would receive upon application of the weighted guidelines were not contemplated when the contract was entered into. The short answer to this contention is that the court expressly rejected it in *Bethlehem I;* the court stated that there was no agreement respecting profit, and that the contract could have resulted in anything from a loss to a windfall profit level, as both parties realized.

The third and final of defendant's arguments is a reiteration of the ASPR committee's stated reason for granting the deviation. That reason, as has been stated above, was that retroactive application "is not feasible, since it [the weighted guidelines] effected a substantive change in the standards existing at the time the contracts were entered into and were intended for the development of a profit objective for negotiation of future contracts." Looking first to the alleged frustration of "intention," it is noteworthy that there is no evidence in the record to support the ASPR committee's statement that only prospective application was intended. As the court noted in *Bethlehem I*, the regulation contains no such limitation and there is no reason to infer one. In addition, defendant did not argue in *Bethlehem I* for prospective application only, but agreed rather that the regulation would generally cover contracts such as the one in question. Even the "Notes and Filing Instructions" which accompanied the regulation and which were cited by the ASPR committee state:

> The revised paragraph 3–808 is authorized for immediate use and maximum practical use is encouraged. However, to allow for an initial training period in the use of the weighted guidelines method, mandatory use is not required until after 1 January 1964. Mandatory use is prescribed for all applicable procurements initiated after 1 January 1964.

Defendant argues further, though, that the fact that the weighted guidelines had the potential for higher profits in order to attract the "best possible industrial capabilities" proves that only prospective application was intended. The conclusion does not follow from the premise, however. First, it should be noted that the court in *Bethlehem I* was aware that the regulation had the potential for greater profits. The regulation itself, section 3.808–1(a), states that use of weighted guidelines "will result in a wider range of profits which, in many cases, will be significantly higher than previous norms." The regulation also states that effective national defense requires attraction of the "best industrial capabilities" and that such capabilities would be dissuaded by "low profit opportunities." Thus, the ASPR committee said nothing which the court had not already read in the regulation itself. Secondly, though the emphasis on potentially higher profits may have been directed to attracting future business, this does not prove that prior contracts were to be excluded from coverage, in the absence of a statement to that effect which could easily have been written into the regulation. The court was aware at the time of *Bethlehem I* that the guidelines, whether weighted or unweighted, were used primarily in negotiating the price to be paid a contractor on a future contract. Determining reasonable profits after completion of contract performance is an unusual situation. Nevertheless, in both *Newport News*, *supra*, and *Bethlehem I*, the court found that absent language in the regulation to the contrary, the existing guidelines were to apply. Indeed, there is no reason why the guidelines cannot be applied. The "Notes and Filing Instructions" accompanying the weighted guidelines include the statement: "This method is a rational, uniform, and equitable approach for evaluating the factors which must be considered in determining a proper profit or fee objective." What is rational, uniform, and equitable for others is equally so for plaintiff.

The ASPR committee's statement that the weighted guidelines represent a substantive rather than a procedural change contradicts the entire basis for decision in *Bethlehem I* and must be dismissed. The new regulation does not guarantee higher profits, but represents simply a less subjective method

of determining fair and reasonable profit. That the less subjective procedure has the potential for higher profit computations only confirms the known fact that changes in procedure can have an effect on substance.

To summarize thus far, I have demonstrated that there is no valid reason why the weighted guidelines cannot feasibly be applied to plaintiff's contract. Indeed, neither the ASPR committee nor counsel in this case has brought anything to the court's attention which the court was unaware of at the time it stated that plaintiff had a legal right to the application of weighted guidelines, or which could have had a bearing on the court's decision. Defendant is in reality still clinging to its assertion, rejected in *Bethlehem I*, that the parties did not contemplate that plaintiff would recover more than a 5-percent profit.

The majority opinion states that the court's opinion in *Bethlehem I* was less a "mandate" than a "summary of the legal options open to defendant." If this be so, and surely it is not, then *Bethlehem I* was no more than an advisory opinion—something which this article III court has no authority to give. In reality, *Bethlehem I* mandated that the weighted guidelines be used, but protected its flank by suggesting that if, for reasons unknown to the court, the application of weighted guidelines would lead to an unfair or absurd result, "the Pentagon" could amend or supplement the regulation to prevent such a result. The court did not give "the Pentagon" *carte blanche* to evade the mandate on any pretext, or, as Judge Nichols states to "attempt to influence a lawsuit." Yet the Pentagon attempted to do just that.

This case bears a certain similarity to *Pacific Far East Line, Inc.* v. *United States*, 184 Ct. Cl. 169, 394 F. 2d 990 (1968). In that case MARAD adopted new criteria for determining the amount of profits which the Government could recapture from a subsidized ship operator. MARAD had originally indicated that the new criteria would be retroactively applied to Pacific Far East Line's earlier years of operation, but when it realized that this would benefit PFEL in the sum of $750,000, it withdrew retroactive application.

The court would not permit such a reversal by MARAD for the following reason:

> * * * We are left with the bald circumstance that MARAD changed its method of accounting after it discovered that PFEL was entitled to a large sum under its original procedure. MARAD's only concern must have been to secure for the defendant the maximum amount of money in the form of recapture. As such, this situation takes on the appearance of market place haggling and unreasonable retroactivity which offended this court in *American President Lines, Ltd.* v. *United States*, 154 Ct. Cl. 695, 705, 291 F. 2d 931, 936 (1961). * * *. [184 Ct. Cl. at 189, 394 F. 2d at 1001.]

In the same way, defendant in this case has reversed itself with regard to the use of weighted guidelines after realizing that plaintiff stands to recover greater profits from their use. Defendant's evasion of the *Bethlehem I* decision in order to influence the results in this lawsuit should not be permitted. Defendant has failed to show weighted guidelines are not feasible here or would produce unfair or absurd results. The majority opinion upholding defendant's change of rules in the middle of the game impairs plaintiff's vested rights against "roving administrative absolutism." The majority condemns as not "cricket" and as "deplorable" and as "outrageous" what has happened here but tolerates it. This is because the issue of a reasonable profit level is said to be factual and for administrative determination according to guidelines which are fair and reasonable and of general application although subject to change at any time for any legitimate reason. My conclusion is that even as stated the test does not fit the facts before us in such a way as to support the majority's result in the case.

I have dealt above with the first of two main arguments plaintiff makes in this case, namely, that the weighted guidelines should have been applied because infeasibilty thereof has not been demonstrated, partcularly because this court in *Bethlehem I* was aware of the factors relied upon by defendant as allegedly showing infeasibility. However, plaintiff has a second cogent argument. Plaintiff says that the board acted arbitrarily and capriciously in applying unweighted guidelines. The majority opinion passes off without elabora-

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tion or refutation this second argument which plaintiff develops at length. Plaintiff makes a good case against the board's implementation of the unweighted guidelines. On either or both grounds plaintiff should prevail, and defendant should lose this case.

DURFEE, *Senior Judge*, and KUNZIG, *Judge*, join in the foregoing dissenting opinion.

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510 F. 2d 1365

KFOX, INC. v. THE UNITED STATES

[No. 151-71. Decided February 19, 1975]

ON THE PROOFS

Taxes; income tax; deductions; depreciation; amortization; allocation of purchase price to assets; valuation; tangible and intangible assets; goodwill; personal service contracts; acquisition of radio station.—Plaintiff-taxpayer was incorporated in 1961 by certain individuals to acquire and operate old radio station KFOX–AM and KFOX–FM located at Long Beach, California. The principal officer of taxpayer agreed to purchase the several assets of said stations for a lump sum. About 4 months after the sales agreement was signed and 1 month after the sale was actually consummated, an independent broker and appraiser, as requested by plaintiff one month earlier, allocated the final purchase price among the various assets obtained from the old KFOX stations. The allocated figures were adopted by plaintiff in computing its federal income tax deductions for depreciation of its tangible assets and amortization of its intangibles for the tax years in issue. On audit the Internal Revenue Service reduced taxpayer's basis for certain assets on which depreciation or amortization had been claimed, i.e. the disc jockeys and station manager service contracts, site lease, studio and office lease, AM towers and transmitters, and record library, and increased the amount which had been allocated to goodwill and the FCC licenses. This resulted in deficiency assessments, including interest. Following payment, plaintiff filed a timely claim for refund, and after 6 months of inaction, plaintiff filed the present suit. The issue before the court is whether taxpayer has presented substantial evidence to overcome the presumption of regularity and correctness in the IRS's valuation of plaintiff's assets for depreciation and amortization purposes. It is *held* (1) that in light of the contradictory testimony and the written bill of sale, plaintiff has not presented substantial evidence sufficient to overcome the presumption of correctness of the IRS's initial determination, that plaintiff made no agreement with the seller to allocate the purchase price among

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the assets as correct, and that therefore the values assigned to the various assets by the broker were made at plaintiff's urging, not as part of the original agreement and are not dispositive of the issue of what tax basis should be assigned to each of the depreciated assets; (2) that as to certain of the tangible assets, i.e. the FM transmitter tower, the studio and office lease and the record inventory, plaintiff has failed to meet the burden of proof to overcome said presumption of correctness and the tax assessment must stand; as to the other tangible assets, i.e. the AM transmitter and associated equipment, based on the evidence before the court, especially the highly probative testimony of defendant's witness, these assets were valued too low by IRS and a slightly higher tax basis is appropriate; (3) as to the transmitter site lease, in light of the facts presented at trial the IRS assessment must stand, inasmuch as plaintiff has failed to meet his burden of proof that the IRS was incorrect in the downward readjustment of the lease's value; (4) that the disc jockeys and station manager contracts are severable from the general concept of goodwill in view of the evidence presented by plaintiff showing that these contracts had significant and measurable independent value; that the contracts may be treated separately for tax purposes; and that they are amortizable over each contract life plus the single renewal option time. In light of the evidence and the invalidity of defendant's legal contention that the contracts are inseverable from goodwill and as such were nondeductible, plaintiff has overcome the presumption of correctness of the assessment, plaintiff's allocation of the purchase price stands, and plaintiff is entitled to a refund for each of the periods in suit of so much tax and related deficiency interest as is attributable to an increase in depreciable basis of said contracts. In summary, plaintiff is entitled to recover a tax refund for depreciation of the personal service contracts and the AM transmitter and judgment is entered to that effect; on all other items plaintiff is not entitled to recover and that portion of the petition is dismissed. The amount of recovery will be determined in further proceedings under Rule 131(c)(2).

Taxes; presumptions; Commissioner of Internal Revenue determinations; presumption of correctness.

[1] In both tax deficiency and tax refund cases, there is a strong presumption that the assessment of taxes owed as determined by the Commissioner of Internal Revenue is correct, and in order to overcome this presumption on appeal the burden is on taxpayer to offer substantial evidence as to the incorrectness of the Commissioner's determination. Once taxpayer has met this burden the presumption disappears and the court may resolve the question upon the basis of all the evidence before it.

Internal Revenue ⟸ 1662, 2207

Syllabus

Taxes; income tax; deductions; depreciation/amortization; basis for; allocation of purchase price to assets by parties.

[2] When two parties to the sale of assets explicitly allocate the aggregate purchase price to the various assets being sold, the valuation they put on each asset will usually be accepted for tax assessment purposes so long as the parties have opposing tax positions and have acted without collusion or fraud and the allocation is not so disproportionate as to be unreasonable.

Internal Revenue ⇐ 1290

Taxes; income tax; deductions; depreciation/amortization; basis for; allocation of purchase price to assets by parties.

[3] While the mere fact that an allocation of the aggregate purchase price to the various assets being sold was deferred does not imply that no agreement as to valuation was present, where the evidence shows that the purchase price was negotiated on the basis of a lump sum and a valuation was not placed on each asset until 4 months after the sales agreement was signed and 1 month after the sale was actually consummated and at the urging of only one of the parties, it is logical to conclude that the specific values of the individual assets were irrelevant to a consummated contract of sale and were not part of the original agreement; accordingly, such an allocation is not binding *per se* on the Internal Revenue Service or this court as the tax basis for each of the assets.

Internal Revenue ⇐ 1290

Taxes; valuation; lease.

[4] Generally, a lease may be valued for tax purposes based on the favorable location of the property and, in addition, any potential income as well as savings attributable to the lease may be capitalized.

Internal Revenue ⇐ 1290

Contracts; personal service contracts; specific performance.

[5] While one cannot obtain specific performance on a personal service contract, injunctive relief may be had for the enforcement of a covenant not to compete so long as the provision is considered reasonable in duration and scope.

Injunction ⇐ 61(2)

Taxes; valuation; intangible assets; goodwill and personal service contracts.

[6] The value of a business' intangible assets is divisible into its identifiable constituent elements for tax purposes. However, whether a radio station's contracts for the personal services of disc jockeys and a station manager are so intertwined with the concept of goodwill as to be considered inseparable depends on the particular definition of goodwill that is used. Thus, if goodwill is defined to mean the intangible value of a going concern which is associated with the reasonable expectancy that old customers will continue to listen

to the same station without any contractual compulsion, then it must be treated as a unitary concept and a deduction on any part of it is disallowable; where goodwill is used as a catchall term for all of a going business' intangible assets that are associated with its profitability, it is divisible into its component parts.

Internal Revenue ⇐ 1290

Taxes; valuation; intangible assets; goodwill and personal service contracts; divisibility.

[7] For tax assessment purposes, where taxpayer has presented clear evdence showing that the personal service contracts of its radio disc jockeys and service manager had significant and measurable value independent of their direct contribution to the value of taxpayer's goodwill and its FCC broadcast licenses and were necessary assets for the continued profitability of the radio station, the service contracts are divisible from goodwill and other intangibles and may be treated separately.

Internal Revenue ⇐ 1290

Taxes; income tax; deductions; depreciation/amortization; personal service contracts.

[8] In general, the cost of an intangible asset which can be shown to have a limited useful life is recoverable through a depreciation allowance over the asset's lifetime. Personal service contracts of radio disc jockeys and a station manager, which represent independent and uniquely valuable assets to taxpayer and ensure through their non-competition clauses that the individuals under contract will not use their skills with any competing organization, are depreciable and amortizable over their contract lives as measured by each contract term plus the single renewal option.

Internal Revenue ⇐ 1290

M. Carr Ferguson, Jr., attorney of record for plaintiff. *Charles T. Mederrick* and *Wachtell, Lipton, Rosen & Katz*, of counsel.

Laurence J. Whalen, with whom was *Assistant Attorney General Scott P. Crampton*, for defendant. *Gilbert E. Andrews*, of counsel.

Before COWEN, *Chief Judge*, SKELTON and BENNETT, *Judges*.

SKELTON, *Judge*, delivered the opinion of the court.*

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*We are indebted to Trial Judge George Willi for his opinion, which has been very helpful although, in part, we reach a different result, and for his findings of fact which, with some modifications, and to the extent necessary, have been incorporated in the body of this opinion.

This case is a suit for a refund of income tax paid pursuant to a finding of tax deficiency by the Internal Revenue Service plus appropriate interest thereon. The period of time involved includes the fiscal year ending November 30, 1963, the taxable period December 1, 1963, through December 31, 1963, and the calendar years 1964, 1965, and 1966. The primary issue in the case deals with the proper allocation of the purchase price of an operating radio station among specific acquired assets.

The plaintiff, KFOX, Inc., formerly Illinois-California Broadcasting Company, Inc., was incorporated under Illinois laws for the purpose of acquiring and operating a Long Beach, California, radio station, KFOX and KFOX–FM (hereinafter referred to as the Old KFOX). Throughout most of its early years and before it was acquired by the plaintiff, Old KFOX operated under a general market format with a limited orientation towards black audiences. During this period the station recorded substantial losses of revenue aggregating over $200,000. In 1957 the original KFOX management tried unsuccessfully to interest the Sonderling Broadcasting Corporation into purchasing the station; Sonderling Broadcasting whose shareholders incorporated the plaintiff was headed by Egmont Sonderling, principal officer of the plaintiff in this suit. When Sonderling expressed disinterest, KFOX and KFOX–FM were subsequently sold in December 1957 to the Bing Crosby enterprises. In early 1959 KFOX was again up for sale as the Crosby group attempted to convince James Blackburn and Company, a national brokerage concern dealing with the communications media, to list the station for sale at $900,000. Blackburn refused because it deemed the selling price to be excessive in view of KFOX's meager annual revenues of $250,000 and yearly operation at a deficit.

At about this time, KXLA, a Pasadena, California, radio station, was undergoing a change in management as well as format. KXLA was long the pioneer of Country and Western (hereinafter "C & W") programming in the Los Angeles area, operating profitably with a small but intensely loyal audience. The radio station's commercial success was due in large part to the popularity of its air personalities, three of

whom included Carl (Deacon) Moore, Tom Brennan, and Charlie Williams. When these disc jockeys at KXLA became aware of the impending change of format to "rock and roll" music they began to look for an alternative radio station that could use their particular talents. Frank Simon, Sales Manager for KXLA, approached KFOX and attempted to interest it into switching over to a C & W programming format and taking on all three of KXLA's air personalities in addition to himself. Because a radio station's audience is more loyal to the particular disc jockey personality and station programming than to the station's call letters, Simon argued that a complete takeover of the three C & W radio entertainers would result in a total transplant to KFOX of KXLA's audience as well as the sponsors that the disc jockeys were personally able to attract. Due to KFOX's poor financial situation, the Crosby interests were receptive to the plan, hiring Moore, Williams, and Brennan, but, as a result of negotiation difficulties, not Simon.

The new disc jockeys and their C & W format proved to be a commercial success as KFOX's profitability steadily rose until the operating revenues had increased from $250,000 in 1959 to almost $500,000 in 1961. The Crosby interests, still wishing to sell KFOX for approximately $900,000, continued to remain in touch with Blackburn and Company as well as the plaintiff through Sonderling. Following receipt of an offer passed through Blackburn, Sonderling began to seriously consider the purchase of the station. Although at first Sonderling sought to acquire KFOX's stock and utilize the station's accumulated net operating losses for its tax advantage, this proved to be impossible and so Sonderling began to negotiate for a straight purchase of KFOX assets. A price of $1,000,000 was tentatively agreed to by both parties for such assets. As a result of adjustments made to account for certain liabilities and revenues assumed by the plaintiff, although not calculated until his actual control and ownership began, the ultimate cash purchase price was eventually set at $878,666.

As a condition to final agreement, Sonderling had two stipulations. First, he requested of the Old KFOX management that the station manager, Murillo Schofield, and the four

Country and Western air personalities (the three KXLA C & W announcers plus Biff Collie who was hired later) then comprising the heart of KFOX's format be required to sign individual personal service contracts, containing, among other matters, a covenant not to compete. Sonderling apparently felt that these five individuals played a critical part in KFOX's turnabout from running a deficit before 1961 to a profitable operation at the time of the sale. Second, he demanded a renegotiation of the lease of the AM transmitter site. Under the old lease which had 16 years to run, the station was charged a monthly rent of $250 for the first three years and $300 for the remaining life of the lease plus the excess of one percent of KFOX's operating revenues over those fixed amounts.

Sonderling's two demands were met by the Old KFOX management. On August 30, 1961, the four Country and Western performers not previously under contract were signed to two year service contracts, renewable once at the option of the station and subject to an anticompetition clause forbidding the talent from working within 100 miles of Long Beach. Schofield was similarly signed to a contract with KFOX. In addition to the contracts, the Old KFOX negotiated the transmitter site lease replacing the percentage of revenue provision of the original rental agreement with a flat $350 rental. The new lease contained one provision not included in the old one, a clause permitting the lessor to relocate the transmitter at his own expense to any acceptable site within a one mile radius.

Having met the stipulations, a firm sales contract was signed between the Old KFOX and plaintiff on September 21, 1961, contingent only on FCC approval of the transfer of KFOX's broadcasting license to the new owners. Due to the need for FCC approval, the plaintiff did not begin to assume control and operation of the KFOX stations until December 1, 1961.

Shortly after December 1961, Colin Selph, sales representative of Blackburn was asked by plaintiff to allocate the final purchase price of $878,666 among the various assets obtained from the Old KFOX stations. In a letter of Janu-

ary 11, 1962, Selph set forth the following suggested allocation:

Country and Western music artists contracts	$250, 000. 00
Station Manager's Contract	150, 000. 00
Contracts with advertisers	26, 500. 00
Net current assets	25, 000. 00
Office supplies	2, 500. 00
Furniture fixtures and leasehold improvements—Studio and Transmitter sites	43, 500. 00
Radio Towers, Radio Transmitters, and associated equipment at transmitter site	70, 000. 00
Studio Equipment—AM and FM	41, 200. 00
FM Towers and related equipment at Studio site	40, 000. 00
Tools, tubes and other technical replacement parts and material	4, 000. 00
Record library	30, 000. 00
Commercial continuity files	6, 500. 00
Promotion material	3, 500. 00
Automobiles	4, 700. 00
Transmitter site lease	50, 000. 00
Studio and Office lease	35, 500. 00
Good will and licenses	95, 766. 96
	$878, 666. 96

The allocation of the purchase price as estimated by Selph of Blackburn and Company was adopted by plaintiff in its tax returns in question here as the tax basis for purposes of computing income tax deductions for depreciation of its tangible assets and amortization of its intangibles. On audit by the Internal Revenue Service certain portions of the basis values employed by the plaintiff for amortization and depreciation were deemed inappropriate and disallowed. Those assets whose values were questioned and adjusted are as follows:

Asset	*Tax Basis Per Return*	*Tax Basis As Adjusted by IRS*
Station Manager's Contract	$150, 000	$40, 909
Performers' Contracts	250, 000	68, 182
Transmitter Site Lease	50, 000	2, 540
Studio and Office Lease	35, 500	6, 000
AM Towers and Transmitter	70, 000	15, 050
FM Towers and Equipment	40, 000	8, 600
Record Library	30, 000	15, 000
Goodwill and FCC License	95, 766	564, 985

As may be noted from the table, the IRS increased the amount of the purchase price allocated to goodwill and the FCC license by the same amount that it reduced the various tangible and intangible assets. Thus, while plaintiff claimed that only $95,766 or 10.9 percent of the total purchase price was paid for goodwill, the IRS determined that $564,985 or 64.4 percent had to be allocated to this non-depreciable asset.

As a result of the redetermination of the tax basis for each of the questioned assets, the IRS assessed the following deficiencies:

Tax Period	*Tax and Deficiency Interest*
FY ending 11/30/63	$94, 762. 25
12/1/63–12/31/63	8, 291. 05
1964	88, 209. 07
1965	53, 093. 46
1966	10, 349. 01
	$254, 704. 84

These deficiences were paid by the plaintiff and a claim for refund timely filed. When this claim was not acted upon by the IRS within six months, the plaintiff commenced an action in this court. The case was heard by our Trial Judges Willi and Fletcher and on February 19, 1974, an opinion was filed by Judge Willi upholding the reallocation of the purchase price as made by the IRS as to all assets but one, the trial judge increasing the value assigned by the defendant to the AM transmitter, *i.e.*, raising the tax basis from the IRS's $15,050 to $18,300. This case is before us now under Rule 143 on plaintiff's exceptions to the trial judge's findings of fact and conclusions of law.

In both tax deficiency and tax refund cases, there is a strong presumption that the assessment of taxes owed as determined by the Commissioner of Internal Revenue is correct. *Welch* v. *Helvering*, 290 U.S. 111, 115 (1933); *Stubbs, Overbeck & Assoc.* v. *United States*, 445 F. 2d 1142, 1148 (5th Cir. 1971); *Young & Rubicam, Inc.* v. *United States*, 187 Ct. Cl. 635, 655, 410 F. 2d 1233, 1244 (1969); *Commissioner* v. *Riss*, 374 F. 2d 161 (8th Cir. 1967). In order to overcome this presumption on appeal the burden is on the taxpayer to offer substantial

evidence as to the wrongfulness of the Commissioner's determination. *Commissioner* v. *Riss*, *supra* at 166. Once the taxpayer has met this burden the presumption disappears and the court must resolve the question upon the basis of all of the evidence before it. *Helvering* v. *Taylor*, 293 U.S. 507 (1935); *Stubbs, Overbeck & Assoc., supra; Commissioner* v. *Riss*, *supra*. Thus the court in *Commissioner* v. *Riss* stated:

> The presumption of correctness rule is usually dispositive of a case in situations where the taxpayer offers no substantial evidence to overcome the presumption created by the Commissioner's determination. However, when the taxpayer has offered substantial evidence to support his position, the presumption disappears. The fact issue must then be resolved by the Tax Court upon the basis of the evidence before it. * * * [374 F. 2d at 166.]

Similarly, in *Stubbs, Overbeck & Assoc., supra*, the court noted:

> * * * [O]nce the presumption [of correctness] is overcome by the plaintiff's evidence, it disappears and is no longer in the case. When this occurs, the court is required to base its decision on the preponderance of all of the credible evidence in the case. * * * [445 F. 2d at 1148.]

The question before us in this case is therefore whether the taxpayer has presented substantial evidence to overcome the presumption of regularity and correctness in the IRS's valuation of the plaintiff's assets for depreciation and amortization purposes. To the extent the plaintiff has met his burden of proof as to any asset improperly valued, the IRS's presumption of correctness falls away and we can place a value on the asset based on all of the evidence obtained at trial before our trial judge.

Allocation by the Parties

The first contention made by the plaintiff is that the parties to the sale of KFOX agreed to make a specific allocation of the purchase price among the various assets of the station. The plaintiff maintains that since the ultimate cash price of the station was not to be determined until after the FCC approved the transfer of the license at which time the

various contemplated adjustments to the $1,000,000 price would be made, the agreed upon allocation was to be deferred until then. Because the allocation made by Blackburn and Company was allegedly pursuant to the agreement among the parties, the plaintiff argues that the IRS and this court should be bound by its terms and the plaintiff's resulting deductions therefore be accepted.

When two parties to the sale of assets explicitly allocate the aggregate purchase price to the various assets being sold, the valuation they put on each asset will usually be accepted for tax purposes so long as the parties have opposing tax positions and have acted without collusion or fraud and the allocation is not so disproportionate as to be unreasonable. *Davee* v. *United States*, 195 Ct. Cl. 184, 444 F. 2d 557 (1971); *Republic Steel Corp.* v. *United States*, 94 Ct. Cl. 476, 40 F. Supp. 1017 (1941); *Annabelle Candy Co.* v. *Commissioner*, 314 F. 2d 1 (9th Cir. 1962); *Ullman* v. *Commissioner*, 264 F. 2d 305 (2d Cir. 1959). To the extent, therefore, that the parties agreed to allocate and in fact did allocate the aggregate price over all of the assets we would be constrained to follow that allocation as the basis to be applied in depreciating those assets. In the instant case, however, based on the ambiguous and somewhat conflicting testimony given before the trial judge, we do not believe the plaintiff sustained the burden of proof necessary to overcome the IRS's determination that there was no mutual agreement to allocate the aggregate purchase price of KFOX and KFOX–FM.

As proof of its allegation that both parties agreed to make such an allocation, plaintiff points to the Bill of Sale which was attached to the Purchase Agreement and designated Attachment A (Plaintiff's Exhibit 22), and which states:

> It is mutually agreed that the total purchase price was decided by adding the agreed upon purchase price of the items or categories herein set forth * * *.

Following this is a listing of assets which directly match the assets appraised by Blackburn in January 1962, and which was used by the plaintiff in its tax returns. Although the Bill of Sale states that the aggregate purchase price was the sum total of the values placed on each of the assets, in fact the assets were not evaluated until January 1962, four months

after the Sales Agreement was signed and one month after the sale was actually consummated. Beyond this, clause 2 of the Sales Agreement appears to contradict the Bill of Sale:

PURCHASE PRICE

> 2. The purchase price of the property, assets and rights so acquired, to be paid by Buyer to Seller shall be one million dollars ($1,000,000), minus the unpaid balances as of the Closing Date on Items (a), (b) and (c) below:
>
> * * * * *

The adjustments to the lump sum contract price referred to in clauses 2 (a), (b) and (c) represent certain assumed liabilities and revenues calculated at the closing date. While it cannot be said that the mere fact that an allocation was deferred implies that no agreement was present, *Annabelle Candy Co.*, *supra* at 7, the fact that a lump sum price was clearly agreed upon long before an allocation was made would seem to indicate that the specific values of the individual assets were irrelevant to a consummated contract of sale. Based on the explicit language of the Sales Agreement and the attached Bill of Sale, it appears that no substantial evidence of an agreement to allocate was shown.

Nor does the testimony of Sonderling or Selph, the appraiser and now president of Blackburn and Company provide the kind of evidence needed to counter the presumption in favor of the IRS's determination on this particular issue. Mr. Selph testified at one point as to how an allocation was agreed upon:

> Q. Sometime after the agreement was executed, then, Mr. Selph, were you requested by the parties to prepare such an appraisal?
>
> A. Yes, sir.
>
> Q. You said it was typical for the seller to request such an appraisal.
>
> Do you recall whether there was a joint request in this case?
>
> A. I think there was a joint request, as I remember.
>
> Q. Did either the buyer or the seller ask you to weight your appraisal in favor of certain assets?
>
> A. No, they didn't, and we wouldn't have, if they had asked.
>
> Q. What were your instructions in connection with the preparation of the appraisal?

A. To evaluate the assets that were being purchased.
[Tr. at 307–08.]

However, in later testimony he stated:

Q. What interest do you think the seller might have in such allocation?

A. The seller wouldn't have much interest in these allocations from the standpoint of, you know, "The king is dead, long live the buyer."

* * * * *

I don't think they [*the seller*] *were interested in getting any appraisal of assets.* [Emphasis supplied.]
[Tr. at 347.]

Sonderling, plaintiff's president, similarly testified as to an alleged agreement to allocate the purchase price:

Q. Did you and Mr. Grillo agree to have a valuation of the various assets prepared by Mr. Blackburn for allocation of the purchase price?
A. Yes, upon request of accountants and at suggestion of counsel it was necessary to have a bill of sale setting forth the assets which we were buying and in order to make appropriate allocations, James Blackburn and Company was requested to make an appraisal.
[Tr. at 446.]

However, in response to questions by the trial judge, Sonderling casts doubt on whether the allocation was either made pursuant to an agreement or for the sake of setting an aggregate price as alleged:

THE COMMISSIONER: Now, this appraisal that you were going to have these people make was after you had struck your essential bargain and with the seller?
THE WITNESS: Yes, your Honor.
THE COMMISSIONER: The appraisal wasn't made for the purpose of putting a price on the overall transaction on which you all were going to trade?
THE WITNESS: No.
[Tr. at 447.]

In light of this contradictory testimony and the Bill of Sale as written, we do not feel that the plaintiff presented substantial evidence sufficient to overcome the presumption of correctness of the IRS's initial determination, and, therefore, we sustain both the trial judge and the IRS in their

finding that the plaintiff had made no agreement with the seller to allocate the purchase price among KFOX's assets as correct. For this reason we hold that values assigned to the enumerated assets by Blackburn were made at the plaintiff's urging, not as part of the original agreement, and, therefore, are not dispositive of the issue of what tax basis should be assigned to each of the depreciated assets.

Despite the fact that we have found that the Blackburn appraisal is not binding *per se* on the IRS or this court, we must point out that such finding alone does not dispose of this case. Rather, we are now free to determine whether the plaintiff has presented substantial evidence showing the incorrectness of the IRS's valuation of each individual asset and if it has made such a showing, we must decide, based on all of the evidence before us, what a correct tax basis of each item should be.

Those assets which were readjusted by the IRS and which remain at issue in this refund suit, once the allocation agreement is removed, include certain tangible assets, the transmitter site lease, the four C & W talent contracts, the station manager's contract and goodwill.

Tangible Assets

The tangible assets which were reevaluated are:

Asset	*Tax Basis Per Return*	*Readjusted Basis by IRS*	*Net Increase or Decrease*
Radio Towers at Transmitter	$70,000	$15,050	$54,950
FM Towers	40,000	8,600	31,400
Record Library	30,000	15,000	15,000
Studio & Office Lease	35,500	6,000	29,500

As discussed earlier, the tax basis claimed by the plaintiff in its income tax returns on those assets is based completely on the allocation of the purchase price as made by Blackburn and Company in January of 1961. The only factual basis upon which these allocations were made is provided by the testimony of Colin Selph, the former appraiser for Blackburn.

As to the FM radio transmitter tower and the studio and office lease, Selph testified that his appraisal was based on replacement costs. No indication, however, is given in his

testimony to shed light on how he determined what those replacement costs were. We are thus faced with Selph's bare assertion that the tower was worth $40,000 and the lease $35,500. In addition to Selph, the plaintiff also presented the testimony of Raymond Rohrer, a consulting radio engineer. Rohrer's testimony was limited to the placing of a $5,000 value on one piece of transmitting equipment. With this single exception, neither Rohrer nor Selph has presented much probative evidence to support the plaintiff's allocation of the purchase price to these particular assets.

Opposed to the evidence placed in the record by the plaintiff is the detailed and fairly explicit testimony of defense witness Leon King, a valuation engineer with the Internal Revenue Service, and the appraisal report prepared by Richard Russell, real estate appraiser. Unlike that of the plaintiff, the record clearly shows the source of the government's evaluation of these assets.

Upon a detailed review of the evidence presented by the plaintiff to show the rationale for its valuation of the FM transmitter tower and the studio and office lease, we are of the view that plaintiff failed to meet the high burden of proof necessary to overcome the presumption of correctness of the Commissioner of Internal Revenue. We find this conclusion even more strikingly necessary when we consider all of the evidence in the record including the extensive and highly probative evidence of the government. For this reason we hold that the assessment of back taxes placed on the deductions taken for the office lease and the FM transmitter tower be sustained.

Similarly, we also find that the plaintiff failed to show by the presentation of substantial evidence that the Commissioner was wrong when he reduced the tax basis on the record inventory from $30,000 to $15,000. Selph in his testimony on this issue stated that he "spot-examined" the library and that it "was represented to contain" between 27,000 and 30,000 transcriptions. Since each physical record contains up to ten songs or transcriptions, the number of records in the library was admittedly far fewer than the number of transcriptions. Selph then proceeded to estimate that each transcription was worth about one dollar. [Tr. 327–29.] When this is compared

to the uncontroverted evidence of King stating that the number of records, as opposed to songs, was closer to 9,000, and that a radio station could get many of those records either free as a promotion or at reduced prices from a distributor, the value of the collection seems to be far less than that established in the Blackburn appraisal. [Tr. 609–15.] We therefore find that the plaintiff failed in his requisite burden of proof and that the presumption of correctness of the IRS must stand.

A somewhat different situation exists with respect to the AM transmitter and associated equipment. Although, as was the case with the studio lease and FM towers discussed above, the plaintiff at trial gave no basis or source for the replacement value of $70,000 he assigned to this particular asset, the government, through the highly detailed testimony of Leon King [Tr. 601–03], indicates that the value of the AM transmitter should have been $18,300 rather than $15,050 determined by the IRS. In this way we feel that although the plaintiff, alone, has not provided sufficient evidence to meet his burden of proof, in combination with the evidence introduced by the defendant, substantial evidence of the invalidity of the IRS's determination is present and its presumption of correctness must disappear. Based on all of the evidence before us, especially the highly probative testimony of the government's witness, we find in accord with the trial judge that the AM transmitter and related equipment must be assessed a tax basis of $18,300 rather than the $15,050 assigned by the IRS.

Transmitter Site Lease

Prior to the purchase of the Old KFOX station by the plaintiff, the Old KFOX owned a lease for the AM transmitter site. The site of this lease was particularly valuable to KFOX because due to its low elevation and close proximity to Alamitas Bay, the particular transmitter provided an unusually strong non-directional signal. The terms of the lease called for, in addition to a flat rent, one percent of the gross revenues in excess of $30,000 per month. As plaintiff viewed the situation, this lease could potentially become a great financial burden to the station in the face of what was hoped to be a continued upswing in its profitability. For

this reason, as we discussed earlier, plaintiff made a renegotiation of the lease a prerequisite to the consummation of the purchase agreement.

The Old KFOX station succeeded in changing the lease to what Sonderling considered more favorable terms. In addition to the extension of the lease from the 16 years that remained to a full 20 years, the rental was made a flat $350.00 a month. However, because the particular tract of land on which the site was located had great potential value in residential development, the lessor demanded that the new lease provide that the lessor could at his own expense relocate the transmitter to any site within a one mile radius which was "equally suitable for lessee's purposes."

In allocating $50,000 to the transmitter lease, Selph of Blackburn and Company apparently took into consideration both the substantial financial savings to be gained by the new lease's terms as well as the particularly favorable location of the site itself. As Trial Judge Willi noted, the savings in rent due to the elimination of the gross revenue percentage override was quite substantial. Looking to the plaintiff's gross receipts for only the five years here in question as evidenced in its tax returns [Pltf. Exhs. 23–28], plaintiff's rental costs for the transmitter site would have been $38,579 under the old lease, nearly $17,200 more than it actually cost under the new flat rental lease. Plaintiff apparently maintains that the rental savings measured over the lifetime of the contract would equal or exceed the $50,000 tax basis allocated by Blackburn and claimed by plaintiff on its tax returns.

As a general proposition a lease may be valued for tax purposes based on the favorable location of the property, and, in addition, any potential income as well as savings attributable to the lease may be capitalized. *John C. Dalton, Jr.*, 21 CCH Tax Ct. Mem. 435 (1962); *William Penn Hotel Co.*, 23 B.T.A. 566 (1931); *Werner & Werner Clothing & Furnishing Goods Co.*, 9 B.T.A. 69 (1927). *See also*, 10 Mertens, *Law of Federal Income Taxation*, §§ 59.48, 59.50 (1970). Plaintiff must nevertheless show by substantial evidence that the Commissioner of Internal Revenue was incorrect in his readjustment of the lease's value from the $50,000 claimed by Blackburn and adopted by the plaintiff to $2,540. This we

feel the plaintiff failed to do. As described in considerable detail in the government's appraisal report, prepared by an expert real estate appraiser, [Def. Exh. 7], the government maintains that the highest and best use of this particular tract was as residential development property similar to that which surrounded the site. Based on this use the government's expert, as backed up by the report, testified that the lease should rent for $387 per month rather than the $350 paid. Capitalizing this $37 a month savings over the remaining life of the new lease yields a total of $1,130 rather than the $50,000 claimed. Moreover, since the particular site was, as a result of its watery location, ideally suitable for a nondirectional transmitter and since any move made pursuant to the lease's alternative site option might result in a less efficient or even reduced coverage pattern [Tr. 475], the value of the new lease having this option is certainly questionable and its tax basis must suitably reflect this. In the light of the facts as presented at trial and heretofore discussed, we believe the assessment made by the Commissioner of Internal Revenue must stand, inasmuch as the plaintiff failed in meeting his burden of proof.

Goodwill and the Five Service Contracts

In addition to the lease for the transmitter site, Sonderling viewed the four Country and Western stars and the station manager as indispensable assets of KFOX and without their continued service would not have considered the purchase of the radio station. These C & W disc jockeys were seen by Sonderling to be at the heart of KFOX's change of fiscal fortune from running a monthly deficit to making a profit. To insure their continued association with the station, Sonderling insisted that the Old KFOX management place the individuals under contract, committing them to render service with the station and, most importantly, prohibiting their working for any other radio station in the Los Angeles area for the duration of the contract.

As urged by Sonderling, Old KFOX negotiated and executed contracts with the five individuals previously not working under any service contract. The four talent contracts were to last two years, each with an option of renewal by the

station for an additional three year term. (Deacon Moore's renewal period was later reduced to two years.) Similarly Schofield, the station manager, was signed to a two year contract with a two year renewal option. As specifically requested by Sonderling, each of these contracts also contained an appropriate non-competition clause:

> * * * In consideration of this agreement, the artist agrees not to work, appear, or permit his voice to be heard on any radio station within a 100 mile radius of the Long Beach area during the term of this agreement or any extension, and the same may be enforced by injunctive proceedings.

The validity of the high value that Sonderling placed on these C & W disc jockeys was first demonstrated by the wholesale transplant of the loyal audience and sponsors of the successful KXLA to KFOX when the three original KXLA stars moved to KFOX in 1959. With the change of format to C & W music and with the popularity of its former KXLA disc jockeys, KFOX's revenues evidenced a dramatic and steady increase in the years from 1959 to 1961. That the increase in revenue was due to the C & W air talents is seen by the influx of new sponsors previously associated with KXLA and apparently brought to KFOX by the three disc jockeys that changed stations. As a result, therefore, of the three KXLA stars, advertising revenues of an incremental nature was brought to KFOX.

During the five years in question in the present suit the plaintiff maintains that Deacon Moore personally accounted for substantial advertising revenues. Thus an analysis of KFOX's advertising reveals that Moore generated the following income for the station:

Year:	*Revenues*
1962	$82, 300
1963	75, 600
1964	66, 900
1965	50, 300
1966	38, 900

[Pltf. Exh. 10.]

These advertising revenues represent sponsors that specifically requested to buy segments of time on Moore's show,

many of whom Moore developed personally or came with Moore from KXLA.

Similarly, Biff Collie, the only C & W air artist who did not come to KFOX from KXLA, was a highly successful announcer, gaining a substantial listening audience at KFOX since he joined in 1959. Combined with Collie were the remaining two C & W announcers, Charlie Williams and Tom Brennan. These three popular announcers along with Moore were thus viewed by Sonderling as the primary factors in KFOX's new profitability.

In addition to the incremental revenues that arose as a result of the presence of these C & W disc jockeys, both Sonderling and Blackburn put value on the non-competition clause of the new contracts. Because at this time there was a dearth of recognized C & W air personalities on the West Coast, and because Sonderling knew that there were a number of radio stations that were interested in hiring the four principal KFOX air personalities, the clause forbidding these personalities from performing in the Long Beach area during the existence of their contract had tangible and measurable value. In fact, shortly after plaintiff completed the purchase, Sonderling was approached by a competing radio station seeking to purchase the services of KFOX's announcers. While it is Hornbook law that one cannot obtain specific performance on a personal service contract, RESTATEMENT OF CONTRACTS § 379 (1932), it is equally clear that injunctive relief may be had for the enforcement of a covenant not to compete as found in these five contracts, so long as that clause is considered reasonable in duration and scope. 5 A. CORBIN, CONTRACTS § 1209 (1964).

The record is also clear as to plaintiff's view of Schofield's value to KFOX. At the time of the purchase of KFOX, Schofield had developed an intimate working knowledge of C & W format radio stations and in addition, maintained a close contact with the national advertising agencies serving the Los Angeles area. As a result of his wide expertise, Schofield acted in several different capacities while working at KFOX, serving as station manager, sales manager, pro-

gram director, and general manager. At trial, Sonderling testified to Schofield's value:

> * * * [Mr. Schofield performed] the jobs of general manager, sales manager, salesman, and program director, he was an invaluable and thoroughly unique personality and in order to be able to operate this station at the budget that we thought it should be operated under, we could not have done so had we not had Mr. Schofield. [Tr. 441–42.]

The record produced by the plaintiff shows that in addition to the subjective value to the station, Schofield saved KFOX substantial money in salary as a result of the multiplicity of jobs that he handled. Thus, if KFOX had to hire a separate person for each position they would have had to pay at a minimum $122,000 in salaries, and perhaps as much as $187,000 [Pltf. Exhs. 5, 20—Tr. 28, 143, 203, 441], whereas in his first year of employment with KFOX, Schofield, doing the work of four, was paid $32,000 thereby saving the station at least $90,000 in salary.

As a result of the incremental sponsors and revenues brought to KFOX by the C & W announcers, Schofield's value to the station, and the covenant not to compete, Blackburn made the following allocation of plaintiff's purchase price:

Artists	
Deacon Moore	$130,000
Biff Collie	70,000
Charlie Williams	40,000
Tom Brennan	10,000
	$250,000
Station Manager	
Dick Schofield	$150,000

Plaintiff adopted these figures as his tax basis in the returns here in question, deducting in each year a figure representing the amortization of these assets over the useful life of the contracts. The Internal Revenue Service denied this allocation completely, holding that these contracts were intangible assets that were inseparable from the concept of "goodwill"

and as such were non-deductible.[1] The amount of the purchase price which the plaintiff allocated to these contracts was assigned to "goodwill and licenses" which after audit had a value of $564,985 or almost 64.4 percent of the overall purchase price.

At trial, while the plaintiff presented evidence on the value of the five contracts, the defendant put on no rebuttal evidence, instead relied on its legal theory that the personal service contracts as intangible assets were inseverable from goodwill and therefore not deductible. The legal issues that are before us at this point are first, whether the artists' contracts are severable from the general concept of goodwill; second, whether these contracts, even if severable, are amortizable; and third, whether the plaintiff has presented substantial evidence to overturn the IRS's presumption of correctness.

As we have heretofore seen, the disc jockeys' and station manager's contracts are certainly intangible assets having significant value. The question is whether their value is one which is separate from all of the other intangibles including goodwill. Case law indicates that a business' intangible value is divisible into its identifiable constituent elements for tax purposes. *Parmelee Transp. Co.* v. *United States*, 173 Ct. Cl. 139, 148, 351 F. 2d 619, 625 (1965); *Indiana Broadcasting Corp.*, 41 T.C. 793, 807 (1964), *rev'd on other grounds*, 350 F. 2d 580 (7th Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966); *Strauss* v. *United States*, 199 F. Supp. 845 (W.D. La. 1961). Thus, these contracts can certainly be divided from the other intangible assets of KFOX so long as they are distinct and identifiable. However, whether they are so intertwined with the concept of goodwill as to be considered inseparable depends on the particular definition of goodwill that is used. Thus, if goodwill is defined to mean the intangible value of a going concern which is associated with the reasonable expectancy that old customers will return to the concern (or as in the instant case continue to listen to the same station) without any contractual compulsion, *Commissioner* v. *Sea-*

[1] In its assessment of taxes owed, the IRS permitted a depreciation deduction of $68,182 on the artists' contracts and $40,909 on the station manager's contract. These deductions were permitted by the IRS only because the relevant statute of limitations had passed and not because it recognized that these assets had some depreciable value independent of goodwill.

board Finance Co., 367 F. 2d 646, 649 (9th Cir. 1966), then it must be treated as a unitary concept and a deduction on any part of it will be disallowed. *See* Treas. Reg. § 1.167(a)–3. On the other hand, where "goodwill" is used as a catchall term for all of a going business' intangible assets that are associated with its profitability it is clearly divisible into its component parts. *See Meredith Broadcasting Co.* v. *United States*, 186 Ct. Cl. 1, 18–20, 405 F. 2d 1214, 1224–25 (1968). *Parmelee Transp. Co.* v. *United States*, *supra*.

In *Parmelee*, although the Internal Revenue Service allocated the value of an informal transportation arrangement to "goodwill" we, despite denying a deduction for the loss of that arrangement for other reasons, clearly held that this goodwill was divisible into its identifiable parts. "While we agree that the arrangements were a part of the general goodwill or intangible value of the transfer business, * * * we reject the notion that goodwill is indivisible." [*Id.* at 148, 351 F. 2d at 625.] Goodwill was therefore considered to have its less restricted meaning.

Similarly, in *Meredith Broadcasting Co.*, *supra*, we held that the value of a network affiliation contract was a separate and determinable intangible asset divisible from goodwill. In that case, the question before us was the proper allocation of that portion of the overall purchase price of an operating station that was due to a network affiliation contract, for the sake of determining what loss deduction would be permitted. To reach the proper allocation we first had to contend with the defense that these contracts were indivisible from all of the remaining intangibles and goodwill. Since the contracts were of significant and identifiable value, we found that they could be severed from goodwill, where goodwill was defined in its more general scope:

> * * * [T]he identity of a particular business arrangement or contract * * * is not lost and * * * the aggregate intangible value of a going business is composed of separate intangible assets which may be separately identified, valued and treated for federal tax purposes, regardless of what terminology may be employed. * * * [*Id.* at 20, 405 F. 2d at 1225.]

In this way we permitted plaintiff to allocate part of the purchase price of a broadcasting station to a network con-

tract to establish a cost basis for tax purposes. *Cf. Roy H. Park Broadcasting, Inc.*, 56 T.C. 784 (1971); *Indiana Broadcasting Corp., supra.*

In the instant case the plaintiff has presented clear evidence showing that the five personal service contracts had significant and measurable value independent of their direct contribution to the value of plaintiff's goodwill and its FCC broadcasting licenses. These contracts were necessary assets for the continued profitability of the station. They provided nothing to KFOX's institutional goodwill inasmuch as radio or television audiences are not loyal to a particular station so much as an individual star or format. *See Meredith Broadcasting Co.* v. *United States*, *supra*, at 5, 405 F. 2d at 1216. Should these stars move to another station, the audience in all likelihood would move also.

> * * * We agree that there is little, if any, goodwill between station and audience since, as has been demonstrated, viewers are concerned with the quality of programs rather than with the particular call letters or management of a station. * * * [*Roy H. Park Broadcasting, Inc.*, 56 T.C. 784, 813 (1971)]

We therefore hold that such service contracts, as are found here, may be divisible from "goodwill" and other intangibles and be treated separately for tax purposes.

Notwithstanding our holding that these contracts are independent assets severable from that of the station's goodwill, it must still be shown that they are amortizable or depreciable. In general, the cost of an intangible asset which can be shown to have a limited useful life is recoverable through a depreciation allowance over that asset's lifetime. Treas. Reg. § 1.167(a)–3 (1969). With respect to such intangible assets as contracts, the reasonable useful lifetime is its stated term. *Triangle Publications, Inc.*, 54 T.C. 138, 147 (1970); *David Hoffman*, 48 T.C. 176 (1967). The existence of renewal options makes the useful life of the contract no less definite. *Bonwit Teller & Co.* v. *Commissioner*, 53 F. 2d 381 (2d Cir. 1931), *cert. denied*, 284 U.S. 690 (1932); *Birmingham News Co.* v. *Patterson*, 224 F. Supp. 670 (N.D. Ala. 1963), *aff'd* 345 F. 2d 531 (5th Cir. 1965). However, as in any other intangible asset, a depreciation deduction is

not allowed where the contract has no definite useful life, such as the case of network affiliation contracts subject to revocation on 90 days notice. *Commissioner* v. *Indiana Broadcasting Corp.*, 350 F. 2d 580 (7th Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966); *Westinghouse Broadcasting Co.* v. *Commissioner*, 309 F. 2d 279 (3d Cir. 1962), *cert. denied*, 372 U.S. 935 (1963).

Beyond the general rule that contracts having a definable lifetime may be depreciated, the Internal Revenue Service has recognized that the cost of personal service contracts may likewise be subject to a depreciation allowance, and in some cases its useful life may include renewal options. Rev. Rul. 137, 1971–1 Cum. Bull. 104; Rev. Rul. 379, 1967–2 Cum. Bull. 127. *Cf. Commissioner* v. *Pittsburgh Athletic Co.*, 72 F. 2d 883 (3d Cir. 1934). In *Pittsburgh Athletic Co.*, *supra*, the court permitted the depreciation of an athletic contract although it limited the useful life to the one year of the contract without considering the reserve clause or renewal option that was part of it. This doctrine was expanded by the IRS in its Rev. Rul. 137, *supra*, in which the Service permitted the cost of a baseball player contract to be capitalized over the useful life which included both the one year term of the contract as well as the additional terms represented by the contract's renewal or "reserve" provision. The cost of the contract was defined to mean the amount paid or incurred on purchasing the contract plus any bonuses paid to obtain the signing. Taking into consideration the "reserve" clause in determining the useful life of a personal service contract was again reconfirmed by the IRS in its Rev. Rul. 137, *supra*, dealing specifically with a football player's contract.

Looking at the particular facts of the instant case we see no reason why the contracts of the C & W announcers and the station manager should be dealt with in a manner different from that of athletic contracts. In both cases the contracts represent independent and uniquely valuable assets to the taxpayer, ensuring through their non-competition clauses that the individuals under contract will not use their skills with any competing organization. To KFOX, as to the professional ball teams, the performers and their con-

tracts are at the heart of the profitability of the taxpayer. Similarly, just as the renewal options of the athlete's contracts are to be considered in determining the useful life of the contract, so too should the single renewal option of the five contracts in question here be included in evaluating the useful life over which the costs of the assets will be capitalized. Therefore, we believe these service contracts are amortizable over the contract life which is measured by the contract terms plus the single renewal option.

We have noted that the plaintiff's four talent contracts and the station manager's contract are severable from the goodwill of KFOX, and, that as in other personal service contracts, no tax policy prevents their being amortized. It must yet be seen whether the plaintiff has presented substantial evidence to overcome the presumption of validity of the Commissioner of Internal Revenue's denial of a deduction.

As discussed earlier, the record in this case is replete with testimony and exhibits presented by the plaintiff tending to show that these contracts were worth the $250,000 and the $150,000 allocated to them as a tax basis. On the other hand, the government presented no evidence in opposition to that of the plaintiff but rather relied on their legal position that the contracts were inseverable from goodwill and as such were non-deductible. In the light of the evidence contained in the record and the invalidity of the government's legal position, it is apparent that the plaintiff has presented substantial evidence sufficient to pierce the presumption in favor of the IRS and cause it to disappear. With the defendant's presumption of correctness no longer before us, we are free to decide this issue based on all of the evidence presented in the record. Inasmuch as there is nothing in the record to contradict the plaintiff's allocation of the purchase price to the five personal service contracts, we are constrained to sustain its position. In addition, to the extent that the plaintiff's allocation of its purchase price to these contracts is increased, the allocation made by the trial judge and the IRS to goodwill must be decreased accordingly.

We, therefore, hold that the four C & W disc jockey contracts should be assigned a total tax basis of $250,000 and that the station manager's contract should be assigned a tax

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basis of $150,000. Plaintiff is therefore entitled to a refund for each of the periods in suit of so much tax and related deficiency interest as is attributable to an increase in depreciable basis of the five contracts as described above and as determined in further proceedings pursuant to Rule 131(c)(2).We also hold that the assessment of the Internal Revenue Service as to all of the remaining assets with the exception of the AM transmitting facility is approved and so much of plaintiff's claim for refund as is attributable to those reallocated assets is denied. Further, we hold that the tax basis for the AM transmitter facility should be increased from $15,000 to $18,300, as determined by the trial judge, and plaintiff be given such refund and interest as is attributable to this increase in depreciable basis.

CONCLUSION OF LAW

Upon the foregoing opinion, containing the necessary findings of fact which are made a part of the judgment herein, the court concludes as a matter of law that plaintiff is entitled to recover a tax refund for the depreciation of the five personal service contracts and the AM transmitter and judgment is entered to that effect. On all other matters we conclude that plaintiff is not entitled to recover and that portion of the petition is dismissed. The amount of recovery is reserved for further proceedings under Rule 131(c)(2).

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511 F. 2d 540

BELLA M. BAILEY v. THE UNITED STATES

[No. 243–73. Decided February 19, 1975]

ON PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

Civilian pay; Civil Service Retirement annuity; creditable service; civilian and military service.—Plaintiff, as personal representative of her late husband's estate, alleges that, because of defendant's erroneous interpretation of 5 U.S.C. § 8332, her husband had been denied the full measure of his Civil Service (CS) annuity. She asks the court to grant credit for plaintiff's military service in the computation of his CS annuity and requests further that we revise her

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husband's retirement records to reflect her interpretation of 5 U.S.C. § 8332. Plaintiff's husband was a Federal civilian employee from 1931 until he took leave in 1942 to enter the Army as a reserve officer; he remained in the military until his discharge in 1951. He then returned to Federal civilian employment for 6 months, after which time he again took leave from his civilian position, this time to enter the Air Force, where he remained until his retirement from the military on January 31, 1964. Until his death plaintiff's husband received a military retirement annuity based on his 21 years of service. In August 1964 he again became a civilian employee, working for the District of Columbia government until retiring on September 30, 1971. After this retirement from civilian service, he began receiving, in addition to his military annuity, a retirement annuity for his civilian employment in the Federal Government. He received provisional credit for his military service in the computation of the CS annuity based on his statement that he was retired under 10 U.S.C. ch. 67. However, when it was determined by the Bureau of Retirement Insurance and Occupational Health (BRIOH) that his military retirement was due to his age and length of service (pursuant to 10 U.S.C. 8911), BRIOH denied use of the military service as a credit for CS retirement annuity purposes. Plaintiff's husband protested the denial of credit on the ground that 5 U.S.C. § 8332 (b) and (g) unqualifiedly allowed military service credit for those in his situation and that he was entitled to credit 13 years, 11 months military service in computation of his CS retirement annuity. BRIOH denied military credit citing 5 U.S.C. § 8332(c) and stating that his military service did not fall within either of the specific exceptions to the para. (c) prohibition against "double" credit for periods of military service. Plaintiff's husband unsuccessfully appealed to the Legislative and Policy Division of BRIOH and to the Civil Service Board of Appeals and Review (BAR). The BAR found that para. (g) was not intended to control situations such as this one and that, instead, para. (c) was controlling. It is held (1) that the legislative history of para. (g), taken as a whole, demonstrates that this provision was enacted to counteract a ruling of the Comptroller General (24 Comp. Gen. 573 (1945)) regarding civilian retirement rights of employee-soldiers; (2) that para. (g) was meant to aid only those Federal employees who leave their civilian jobs during times of national emergency or war to enter military service and who become so disabled that they cannot return to civilian Government service; (3) that since plaintiff's husband was retired for longevity and not by reason of physical disability, his military service did not qualify him for the benefits intended by para. (g) and his entitlement to CS retirement annuity is governed by para. (c) of section 8332; and (4) that the decision of the BAR was correct as a matter of law. Plaintiff's motion for summary judgment is denied, defendant's cross-motion is granted, and the petition is dismissed.

Opinion of the Court

Civilian pay; Civil Service Commission decision; finality of decision.

[1] A decision of the Civil Service Commission on a question of law is not binding on this court.

Courts ⇐ 460

Statutes; construction and operation; unambiguous language; generally.

[2] A clear and unambiguous statute speaks for itself.

Statutes ⇐ 190

Statutes; construction and operation; legislative intent.

[3] In determining the purpose of a statute, one can never divorce the statute from the circumstances existing at the time it was passed or from the evil which Congress sought to correct and prevent.

Statutes ⇐ 214, 215

Civilian pay; Civil Service retirement; computation of annuity; creditable service; military service during national emergency; congressional intent.

[4] In enacting 5 U.S.C. § 8332(g), the congressional purpose and intended scope of the legislation was to permit only those Federal employees, who during a period of national emergency left their jobs to enter military service and who sustained such combat-related wounds as to prevent their return to Federal service, to receive the benefits of the Federal Employees Retirement Act to which they would have been otherwise entitled.

Armed Services ⇐ 115(2)

Civilian pay; Civil Service Retirement; computation of annuity; creditable service; military service.

[5] A person retired from the military because of age and length of service who is receiving a military retirement annuity based on *all* of his military service and who reentered Federal service after completion of his military service, is barred under 5 U.S.C. § 8332 (c) from receiving credit for any portion of his military service in the computation of his Civil Service retirement annuity.

Armed Services ⇐ 115(2)

Robert H. Turtle, attorney of record, for plaintiff. *James M. McHale*, of counsel.

Stephen Schachman, with whom was *Assistant Attorney General Carla A. Hills*, for defendant.

Before COWEN, *Chief Judge*, SKELTON and BENNETT, *Judges*.

COWEN, *Chief Judge*, delivered the opinion of the court:

Mrs. Bella M. Bailey brings this action as personal repre-

sentative of her late husband, Lieutenant Colonel Frank W. Bailey, (Ret.).[1] Plaintiff alleges that her husband, because of the erroneous decision of defendant, was denied the full measure of his Civil Service retirement annuity. Plaintiff directly calls into question the interpretation of Title 5, Section 8332 of the United States Code as formulated by the Board of Appeals and Review in its decision in this matter on May 25, 1973. As a result, she sues to recover an amount of money representing the difference between the past annuity payments her husband received and the amount of payments to which she claims he was entitled. She asks further that we order the Civil Service Commission to revise the retirement records of her late husband to reflect her interpretation of 5 U.S.C. § 8332.[2] For reasons discussed below, we believe the Board of Appeals and Review was correct in its interpretation of the relevant statutory provisions and, accordingly, we have concluded that plaintiff should not recover.

The case is before us on cross motions for summary judgment, and there is no dispute as to material facts. Plaintiff's husband commenced a long career of Federal service on March 2, 1931, as a civilian employee of the War Department. After serving as an inspector, boatman, and student engineer, Col. Bailey rose through the ranks until he became an Associate Engineer in 1942. In August 1942, after more than 11 years in the Federal Government as a civilian employee and during the height of World War II, Col. Bailey became an officer in the active Army, serving until his discharge in 1951. After leaving the military, plaintiff's husband was again employed by the Government in a civilian position, this time as a GS–11 General Engineer with the Department of the Army. However, this stint as a civilian employee lasted only 6 months; in July 1951, Col. Bailey took leave from his

[1] Having already exhausted his administrative remedy available at the Civil Service Commission, Col. Bailey himself brought this action before the court. However, before we could hear oral argument on his claim, he died on July 24, 1974. Our decision has been held in abeyance pending proper substitution of a party plaintiff under Rule 66(a). This substitution occurred on December 20, 1974, when Mrs. Bailey, as the authorized personal representative of her late husband's estate, was named as plaintiff in this litigation.

[2] It should be noted that the question of this litigation did not become moot by the death of Col. Bailey, especially since his widow's benefits are calculated by reference to the amount of his annuity during life.

Civil Service position to enter the Air Force during the Korean Conflict. His military career continued for 12½ years, until he retired from the Air Force on January 31, 1964. During his lifetime, Col. Bailey received a retirement annuity from the Air Force, based on the 21 years he served in the military.

Col. Bailey's retirement from the military is not the final chapter of this story. Seven months thereafter he again became a civilian employee, as a GS–11 General Engineer with the District of Columbia. His retirement from the civilian service of the Federal Government occurred on September 30, 1971, as a GS–12–05 General Engineer. After this retirement, Col. Bailey began receiving, in addition to his military annuity, a retirement annuity for his civilian employment in the Federal Government. Although he originally received credit for certain periods of his active military duty in the computation of his Civil Service retirement pay, this computation was only provisional. Indeed, credit for his military service was allowed only because of Col. Bailey's incorrect statement as to the reason for his retirement; he originally stated that he had been retired under Chapter 67, Title 10 of the United States Code. When it was determined that, in fact, Col. Bailey's retirement from military service was due to his age (63) and the length of his military service and had been accomplished pursuant to 10 U.S.C. § 8911, the credit was denied by the Bureau of Retirement Insurance and Occupational Health (BRIOH). This decision by BRIOH had the effect of reducing Col. Bailey's Civil Service retirement annuity from the provisional amount of $840 per month to $431 per month.

Plaintiff's husband immediately protested the denial of credit for his military service; he claimed the ruling was the result of a "misapplication of the statute, 5 U.S.C. § 8332." Col. Bailey's primary focus in this protest was on paragraphs (b) and (g) of section 8332, which provide:

> (*b*) The service of an employee shall be credited from the date of original employment to the date of separation on which title to annuity is based in the civilian service of the Government.
>
> * * * * *

(g) An employee who during the period of a war, or of a national emergency as proclaimed by the President or declared by Congress, leaves his position to enter the military service is deemed, for the purpose of this subchapter, as not separated from his civilian position because of that military service, unless he applies for and receives a lump-sum credit under this subchapter. However, the employee is deemed as not retaining his civilian position after December 31, 1956, or after the expiration of 5 years of that military service, whichever is later.

Simply stated, it was Col. Bailey's position that these two paragraphs unqualifiedly allow credit for military service for those in his situation and that he was entitled to credit 13 years, 11 months of his military service in the computation of his Civil Service retirement annuity.[3]

However, Mr. Isaac Joseph, Chief of Section, BRIOH, was not persuaded by Col. Bailey's argument and denied his request for reversal of the original BRIOH position. In his letter dated May 11, 1972, to Col. Bailey's attorney, Mr. Joseph stated:

> [Section 8332] cannot be construed to mean that all civilian employees who leave their positions to enter the Armed Forces are entitled to civilian retirement credit for such periods of service in the Armed Forces regardless of the fact that they may receive retired pay based on the military service.

The BRIOH placed special emphasis, not on paragraphs (b) and (g) of section 8332, but on paragraph (c), which provides:

> (c) Except as provided by subsection (d) of this section, an employee or Member shall be allowed credit for periods of military service before the date of the separation on which title to annuity is based. However, if an employee or Member is awarded retired pay on account of military service, his military service may not be credited unless the retired pay is awarded—
>
> (1) on account of a service-connected disability—
>
> (A) incurred in combat with an enemy of the United States; or

[3] This calculation includes the entire 8 years, 6 months of active duty from August 1942 to February 1951, and the portion of his second "tour of duty" that occurred prior to December 31, 1956 (5 years, 5 months).

(B) caused by an instrumentality of war and incurred in line of duty during a period of war as defined by section 301 of title 38; or

(2) under chapter 67 of title 10.

It was the Government's position, as it is today, that no credit should be allowed Col. Bailey, since his military service did not come within either of the specific exceptions to the paragraph (c) prohibition against "double" credit for periods of military service.[4]

This initial affirmance of the original BRIOH decision regarding Col. Bailey's civilian annuity was appealed first to the Legislative and Policy Division of BRIOH, where Solomon Pepperman, Chief of the Division, concluded that:

> [u]nless and until Colonel Bailey elects to waive his retired pay, 5 U.S.C. 8332(c) bars us from allowing him credit in the computation of his annuity benefits for his periods of military service from August 2, 1942 to June 16, 1950, and from July 19, 1951 to January 31, 1964.

Following this final decision by BRIOH, Col. Bailey appealed to the Board of Appeals and Review (BAR). The parties agree that during its consideration of the appeal, BAR received a policy memorandum regarding the correct interpretation of section 8332 from the Legislative and Policy Division of BRIOH. This correspondence, as well as Col. Bailey's personnel file, was transmitted to Col. Bailey's attorney. However, two items attached to the original memorandum were not sent to plaintiff's husband or to his attorney; these enclosures were the prior Civil Service decisions in *Charles S. Lawrenson* (CSF 300 243) and *William H. Looney* (CSF 858 784). In denying Col. Bailey access to these opinions, William P. Berzak, Chairman of the BAR, wrote on May 3, 1973, that:

> the Board adjudicates each case on the basis of the record in that case and is not bound by previous decisions on other appeals.

* * * * *

[4] Since Col. Bailey never petitioned the Air Force Board for Correction of Military Records to change the character of his retirement, we must assume that he was indeed retired pursuant to 10 U.S.C. § 8911 as found by BRIOH. Furthermore, plaintiff now does not contend that her husband was retired as described in paragraph (c)(1) or (c)(2) of section 8332.

> 5 CFR 831.106 provides that the Commission shall not disclose information from the files, records, reports, and other papers and documents pertaining to a claim filed with the Commission, whether potential, pending, or adjudicated. Therefore, the files of other cases appealed to the Board are not for release.

No further action was taken by Col. Bailey regarding the information he requested but did not receive, and on May 25, 1973, the BAR denied Col. Bailey's appeal on the merits of his claim. In its decision, the BAR found that paragraph (g) of section 8332 was not intended to cover situations such as Col. Bailey's, and that paragraph (c), which was determined to be controlling, "plainly state[d] that if retired pay is awarded on account of military service, with the exceptions noted, military service may not be credited toward Civil Service Retirement."

I

Mrs. Bailey's action presents the court with an issue of first impression: whether a person retired from the military because of age and length of service, who is receiving a military retirement annuity based on *all* of his military service, is entitled to credit any portion of that military service in the computation of his Civil Service retirement annuity. More simply stated, our question is whether a Federal employee can receive double credit for his military service for reasons other than those specifically listed in 5 U.S.C. § 8332(c) (1) and (2). The cases cited to us by the parties are clearly not precisely on the point presented in this case; instead, they deal with whether an employee can count his years of military service, which are *not* used to determine his military retirement pay, to increase the period of his service for the computation of his Civil Service retirement annuity. For example, in *Prentiss* v. *United States*, 123 Ct. Cl. 225, 105 F. Supp. 989 (1952), the plaintiff served approximately 32 years with the military but received a military retirement annuity based on only 30 years of his military service. The court allowed the plaintiff to use the period of time spent in the military *in excess* of 30 years to supplement his 7½ years of civilian employment in the computation of his Civil Service retirement pay. *See Bond* v. *United States*, 133 Ct. Cl. 204

(1955), *cert. denied*, 351 U.S. 974 (1956). This holding was later extended somewhat in *Hobson* v. *United States*, 151 Ct. Cl. 201 (1960), when the court determined that such "excess" military service need not be in excess of 30 years but could be any time spent in the military which is *not* utilized in the computation of the military annuity.[5] Thus, it is clear that this line of decisions neither condones nor forbids the type of dual credit Mrs. Bailey is presently seeking.

II

Although she relies mainly on her interpretation of the applicable statute, plaintiff also challenges the validity of the administrative decision on two grounds which are unrelated to its correctness as a matter of law. As previously stated, the Director of BRIOH sent the Chairman of the BAR a memorandum which recited the provisions of 5 U.S.C. § 8332(c), discussed some of the legislative history of that statute, and referred to two previous decisions by the Civil Service Commission. Plaintiff's attorney was furnished a copy of the memorandum before the appeal was decided, but his request for copies of the decisions in the two cases referred to was denied. Plaintiff maintains: (1) the memorandum constituted an *ex parte* communication which nullifies the decision of the BAR; (2) the Freedom of Information Act voids the BAR decision, because it relied on two previous decisions which were not made available to the public, and (3) the defendant's failure to furnish plaintiff's attorney with copies of the two decisions mentioned was a denial of due process, which renders the decision null and void. Plaintiff's purpose in advancing these contentions was clarified by plaintiff's attorney at oral argument when he stated:

> [W]e raised those two basic arguments because we believe the Civil Service proceedings held in this case,

[5] The plaintiff in *Hobson*, although serving for 25 years, 8 months in the military, received retired pay based on the active-duty pay of a person of his rank with 24–27 years of service. He argued successfully that his military annuity was actually based on 24 years of service and that 1 year, 8 months could be categorized as "excess," pursuant to *Prentiss*. 151 Ct. Cl. at 202. *Hobson* specifically overruled that part of the decision in *McLarren* v. *United States*, 147 Ct. Cl. 497, 178 F. Supp. 478 (1959), which had held that only where there were over 30 years of service could there be "excess service." 151 Ct. Cl. at 204.

and for that matter, in all cases, do not comply with due process. *We don't believe that the record established in those cases or the decision-making process should be given any weight by this court.*

We need not and do not rule on the merits of these contentions. Any denial of due process or other error by the Civil Service Commission is of no consequence in the present posture of this case. The facts are not in dispute, and we are not concerned here with a challenge to any administrative finding of fact. On the contrary, the BAR ruling was a decision on a question of law which is not binding on the court. Therefore, if plaintiff were correct in her interpretation of section 8332, we could render a decision in her favor and thereby remedy any lack of due process or other defects in the administrative proceedings.

III

As plaintiff's counsel conceded at oral argument, "this is clearly a case of statutory construction, pure and simple." The proper starting point for interpreting section 8332 is, of course, the specific language found therein, since "a clear and unambiguous statute speaks for itself." *Selman* v. *United States*, 204 Ct. Cl. 675, 680, 498 F. 2d 1354, 1356 (1974). However, the language of paragraphs (b) and (g) of section 8332, taken together, seemingly contradicts the general prohibition against "dual credit" clearly enunciated in paragraph (c) of the same statute. It is our duty to attempt to harmonize these various statutory provisions,[6] and in order to accomplish this task, we must determine the intended scope of the paragraphs upon which plaintiff relies.

To decide whether Col. Bailey's situation was intended by Congress to be governed by the language of paragraph (g), we must delve into the purpose of that provision and the circumstances under which the language was employed. *American Export Isbrandtsen Lines, Inc.* v. *United States*, 204 Ct. Cl. 424, 469, 499 F. 2d 552, 579 (1974); *Sea-Land Service, Inc.* v. *United States*, 204 Ct. Cl. 57, 71, 493 F. 2d

[6] *See Montgomery Charter Serv. Inc.* v. *Washington Metropolitan Area Transit Comm'n*, 325 F. 2d 230 (D.C. Cir. 1963). *See also Maiatico* v. *United States*, 302 F. 2d 880, 886 (D.C. Cir. 1962).

1357, 1361, *cert. denied*, 419 U.S. 840 (1974); *see Puerto Rico* v. *Shell Co. (P.R.) Ltd.*, 302 U.S. 253, 258 (1937). A statute can never be divorced from the circumstances existing at the time it was passed or from the evil which Congress sought to correct and prevent. *United States* v. *Wise*, 370 U.S. 405, 412–14 (1962); *CAB* v. *Delta Air Lines, Inc.*, 367 U.S. 316, 323–24 (1961); *United States* v. *Champlin Refining Co.*, 341 U.S. 290, 297 (1951); *Akins* v. *United States*, 194 Ct. Cl. 477, 483, 439 F. 2d 175, 177 (1971). In their arguments before the court, both parties have relied primarily on the available legislative history of paragraph (g), and we also turn to this source in interpreting the statutory provisions at issue.

Section (g) was originally enacted November 9, 1945, by the 79th Congress directly to counteract a Comptroller General's decision handed down in January of that year. *See* 24 Comp. Gen. 573 (1945). This opinion (No. B–46952) overturned existing Civil Service Commission policy and determined that a Government employee-soldier could not be continued in a civilian status for retirement purposes while on active duty; from this determination it followed that no right to any civilian retirement benefit or service credit toward retirement longevity could attach until the employee returned to his civilian position. *See BAR Decision*, at 3; *Nordstrom* v. *United States*, 169 Ct. Cl. 632, 642, 342 F. 2d 55, 61 (1965). The Civil Service Commission disagreed with the Comptroller General on this subject and proposed the bill (H.R. 3256), which later became the 1945 Act, Public Law 79–216. What troubled the Commission was the differentiation made as a practical result of the Comptroller General's decision between the treatment of employees furloughed at the commencement of World War II from their civilian Government positions to work in private industry and those who entered the military. As was stated in a letter dated May 15, 1945, to Representative Sam Rayburn from Harry B. Mitchell, President, United States Civil Service Commission:

> Under the [Comptroller General's] decision such persons who become disabled in employment in private industry would be entitled to such compensation as may be allowed by the employer or State laws as well as disability annuity under the civil-service retirement law; whereas, a furloughed employee disabled in combat with

> the enemy would be deprived of any retirement annuity by reason of his civil service with the possible exception of some future annuity benefit to which he may have had a vested right at the time of entrance in the military service.

Thus, it is clear that the concern of the Commission was not a general one for all personnel leaving civilian employment to serve in the military, but rather was directed specifically at those who, because of combat-related wounds, were unable to return after the war to their previous civilian positions.

The Committee Reports accompanying H.R. 3256 demonstrate that Congress passed this legislation with only a small class of employee-soldiers in mind. House Report No. 757 states in part that:

> The purpose of this bill is to meet a decision of the Comptroller General ruling that it is not possible for a former employee who returns from the armed services with a physical disability and whose condition is such as to prevent his reemployment, to receive the benefits of the Retirement Act.

H.R. Rep. No. 757, 79th Cong., 1st Sess. 1 (1945). The Senate Report evidences a similar legislative purpose when it states:

> The purpose of this bill is to permit the retirement of former employees of the Government who incur physical disability while serving in the armed forces, without requiring them to be restored to their civilian positions prior to retirement.

S. Rep. No. 564, 79th Cong., 1st Sess. 1 (1945).

Further evidence of the Congressional purpose and intended scope of this legislation may be found in the debate on this bill in the House of Representatives on June 25, 1945. Congressman Ramspeck, Chairman of the Civil Service Committee, spoke eloquently of the desire of the Committee when he said:

> Mr. Speaker, the purpose of this bill is to cure a situation *that has developed in a few cases* where veterans have come back from service in the armed forces and have been unable to return to their positions.
>
> Under the Retirement Act, in such cases they are not entitled to disability retirement; whereas if they could go to work for 1 day, they would be entitled to it.

> The Civil Service Commission has recommended this bill. The committee has passed it unanimously, feeling that it is not right or fair to deprive these men who have suffered grave injury because of their service in the armed forces—to deprive them of their disability retirement rights simply because of the technicality that they cannot return to their former jobs for as much as 1 day. Some of the disabled cases are mental cases who could not be restored to their positions. If they came back with some other disability under which they could go back to work for even as much as a day, they could get the disability retirement.
>
> * * * * *
>
> [The bill] *deals only with the cases of men who are unable to go back to work.* As I stated, cases have come to our attention of mental disability where they could not go back to work for even a minute * * *.

91 Cong. Rec. 6653 (1945) (remarks of Congressman Ramspeck). Congressman McCormack summed up the Congressional purpose in the following manner:

> In other words, the purpose of this legislation is to say that a man who was working for the Federal Government and left that employment to enter the armed services, either the Army, Navy, Marines, or Coast Guard, was wounded and disabled while in the service to the point that he cannot go back to his former Federal job or any other Federal job, that such person will not be denied the benefits he would otherwise be entitled to under the Federal Employees Retirement Act.

91 Cong. Rec. 6654 (remarks of Congressman McCormack).

The original version of 5 U.S.C. § 8332(g) did not contain a provision limiting creditable military service to the later of either December 31, 1956, or 5 years after the expiration of military service. This limitation was added by the Federal Executive Pay Act of 1956, Public Law 84–854. Since this addition was only a minor portion of a long and complicated Act, which dealt with a wide range of material in the Federal personnel area, little was said about paragraph (g) in the available legislative history. In fact, the only reference to this paragraph is found in a letter from Phillip Young, Chairman, Civil Service Commission, to Congressman Tom Murray, Chairman of the House Committee on Post Office and Civil Service. Plaintiff argues that

this correspondence demonstrates that the Commission had construed section 8332(g) as allowing all employees credit for military service in computing civil service annuities. While certain portions of Chairman Young's letter are unclear, we certainly find nothing therein which is sufficient to contravene the clear Congressional purpose evidenced throughout the legislative history of the original enactment of paragraph (g). Although Chairman Young made no direct reference to the narrow purpose of this provision, he alluded to it indirectly when, in describing the proposed limitation on paragraph (g), he stated:

> This provision would generally affect adversely only those persons who *do not* return to civilian duty. [emphasis supplied]

In summary, we hold that the legislative history of paragraph (g), taken as a whole, demonstrates clearly that this provision was enacted for the specific purpose of counteracting the ruling of the Comptroller General regarding civilian retirement rights of employee-soldiers. Furthermore, we conclude that paragraph (g) was meant to aid only those Federal employees who left their civilian jobs during times of national emergency to enter military service and became so disabled or otherwise incapacitated that they were unable to return to civilian Government service.[7] Although we presume that Col. Bailey served his country with valor during World War II and the Korean Conflict, the simple fact is that he was able to return to civilian positions after both tours of duty. Therefore, his military service did not qualify him for the benefits intended by paragraph (g), and his entitlement to retirement annuity is governed by the clear language of paragraph (c).

IV

For the reasons stated, we find that the decision of the Board of Appeals and Review was correct as a matter of law.

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[7] It should be noted that this conclusion is in line with what the court has determined to be the scope of paragraph (g) in the past, when it has been confronted with other issues in this area. *See Nordstrom* v. *United States*, 177 Ct. Cl. 818 (1966); *Nordstrom* v. *United States*, 169 Ct. Cl. 632, 342 F. 2d 55 (1965).

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Accordingly, we deny plaintiff's motion for summary judgment, grant defendant's cross motion for summary judgment, and dismiss plaintiff's petition.

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511 F. 2d 1165

LUDWIG BLAHA, ET AL. v. THE UNITED STATES

[No. 241–73. Decided February 19, 1975]

ON DEFENDANT'S AND PLAINTIFFS' MOTIONS FOR SUMMARY JUDGEMENT

Civilian pay; Wage Board employees; crews of vessels; pay comparability with private shipping employees; wage increase re vacation pay; National Maritime Union agreement; "public interest" exception; Commerce v. Navy Department policies.—The 41 plaintiff seamen, members of the National Maritime Union (NMU) and employed as unlicensed vessel employees of the National Oceanic and Atmospheric Administration (NOA), Commerce Department, claim entitlement under 5 U.S.C. § 5348 (Supp. II, 1972), to a wage increase (vacation or monthly leave supplement) agreed to in 1972 by the NMU, the commercial operators and the Navy Department, and which NOA has refused to pay. Plaintiffs contend that the Secretary of Commerce has a non-discretionary duty to pay the prevailing commercial rates or, alternatively, that he abused his discretion in refusing to pay said rates. On the West Coast pay rates are negotiated on the basis of a 56-hour work week, and leave is paid accordingly; the East Coast seamen have a 56-hour normal work week described in terms of 40 hours "straight time" and 16 hours "overtime." The effect of this was that until the 1972 agreement, East Coast seamen received less vacation pay (computed on the basis of 40 hours weekly pay) than the West Coast seamen (whose weekly pay was computed on the basis of pay for 56 hours). The statutory leave for seamen on extended voyages is 2 days for each 30 days of that service plus regular leave accrual under 5 U.S.C. § 6303. Commerce apparently argues that as used in Federal personnel law "pay" means "base pay," whereas a broader term is required when Congress alludes to overtime, night and holiday differentials, etc., that since the number of days on leave are fixed by statute, not by collective bargaining, the compensation per day must be statutory also, and that the statute, absent express provision, by implication selects the base pay as the statutory vacation rate. Commerce also argues that it has found the vacation pay supplement to be inconsistent with the "public interest" under the exception in sec. 5348. The court has reviewed the legislative history of the statute as well as a statement of the Navy Department providing additional background into the statute and its operation and

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the Navy policy in adopting the wage increase for its vessel crews. It is *held* that under the peculiar facts and circumstances of this case, for the reasons given, and since Commerce has asserted no compelling reasons for making a distinction between Commerce and Navy policies to justify different treatment, Commerce is wrong in asserting it would be illegal to pay the vacation supplement and abused its discretion in making the "public interest" determination here involved, and is required to pay the same wage increase as approved previously by the Navy. The involved supplement is needed to equalize Atlantic and Pacific vacation pay. Defendant's motion for summary judgment is denied, plaintiffs' cross-motion is granted, and judgment is entered for plaintiffs. The case is remanded to the Trial Division for further proceedings under Rule 131(c).

Civilian pay; Wage Board employees; seamen aboard United States vessels; wages; discretion of Secretary of agency in setting.

[1] Under 5 U.S.C. § 5348 (Supp. II, 1972), there is a broad congressional grant of administrative discretion to the Secretary of the concerned agency in fixing wages of civilian crews of United States vessels.

Armed Services ⇐ 27

Civilian pay; Wage Board employees; seamen aboard United States vessels; pay comparability with private shipping employees; overtime, vacation, etc. pay.

[2] In enacting legislation respecting pay rates for seamen, Congress meant to authorize Government agencies owning and operating ships, with civilian crews, to adopt private industry pay practices in their totality, as to differentials, overtime, premiums, or any other general pay practice that entered into and became a part of the seamen's take-home pay, subject to the "public interest" exception of 5 U.S.C. § 5348 (Supp. II, 1972). A partial and selective adoption by a Government agency of some but not all of such practices does not make sense with reference to any objective the Congress could conceivably have been seeking to achieve.

Armed Services ⇐ 27

Statutes; construction and operation; legislative intent; generally.

[3] In statutory construction, unless the language is compelling, it is well to avoid interpretations no one can believe the Congress could have intended.

Armed Services ⇐ 181(1)

Civilian pay; Wage Board employees; seamen aboard United States vessels; pay comparability with private shipping employees; vacation time; Navy Department policy.

[4] The pay rate policy of the Navy Department adopting the wage for monthly leave supplements negotiated between the National Maritime Union and East Coast commercial shipowners on June 16, 1972 was a good faith effort to effectuate the policy of 5 U.S.C. § 5348 (Supp. II, 1972), based on an informed and reasoned analy-

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sis of the underlying facts and was well within the scope of discretion which the statute contemplates the employing agencies will exercise, not only as to the exclusion of practices it is not "consistent with the public interest" to conform to, but as to other questions as well.

Armed Services ⇐ 27

Statutes; construction and operation; administrative interpretation; generally.

[5] While it is common for the courts to defer to agency expertise in many matters, the agency charged with administering a statute may not adopt a position inconsistent with the enabling statute.

Administrative Law and Procedure ⇐ 330

Civilian pay; Wage Board employees; seamen aboard United States vessels; pay comparability with private shipping employees; "public interest" consideration.

[6] The Congress in enacting 5 U.S.C. § 5348 in 1972 recognized the unique character of the pay practices in the maritime industry, and its solution was to authorize pay practices to conform "as nearly as is consistent with the public interest." The "public interest" exception was written to provide flexibility needed to eliminate anomalies and inequities that might arise from a too literal conformity to industry pay practices, and was not written to authorize a complete frustration of the congressional scheme.

Armed Services ⇐ 27

Statutes; construction and operation; administrative interpretation; conflicting agency determinations.

[7] In reviewing an agency's interpretation of a statute, conflict with determinations of other agencies is a factor to be considered.

Administrative Law and Procedure ⇐ 330

Civilian pay; Wage Board employees; seamen aboard United States vessels; pay comparability with private shipping employees; administrative discretion.

[8] Where two or more agencies of the Government may be affected by a new collective bargaining agreement negotiated between the National Maritime Union and East Coast commercial shipowners, and one agency adopts the agreement as applicable to its vessels' civilian crew who are members of the Union, if the other agency thereafter just arbitrarily chooses to go a different way, in light of 5 U.S.C. § 5348 the onus of abuse of discretion falls on it.

Armed Services ⇐ 27

Civilian pay; Wage Board employees; seamen aboard United States vessels; pay comparability with private shipping employees; administrative discretion; "public interest" exception.

[9] In interpreting the "public interest" exception of 5 U.S.C. § 5348, where the Commerce Department has failed to supply the

court with reasons for upholding its position on "public interest" in deciding not to adopt the subject collective bargaining agreement that were not equally applicable to the Navy Department which had adopted the agreement respecting the civilian crew on its vessels, and the Commerce Department apparently made no effort to ascertain Navy's experience in implementing the agreement, the court is not required to conjure up reasons to support the exercise of discretion by the Commerce Department.

Armed Services ⇐ 27

Stanley B. Gruber, for plaintiff. *Abraham E. Freedman*, attorney of record.

Marc J. Fink, with whom was *Assistant Attorney General Carla A. Hills*, for defendant. *Paul A. Zoss*, of counsel.

Before DAVIS, NICHOLS, and KUNZIG, *Judges*.

NICHOLS, *Judge*, delivered the opinion of the court:

Plaintiff seamen are members of the National Maritime Union of America (NMU) employed as unlicensed vessel employees of the National Oceanic and Atmospheric Administration (NOA), National Ocean Survey (NOS), Department of Commerce. This suit pits the Commerce Department against the NMU and the Navy Department, on the issue of whether 5 U.S.C. § 5348 requires the Commerce Department to pay a wage increase (denominated a "monthly leave supplement") already agreed to by the NMU, the commercial operators, and the Navy. We have jurisdiction under 28 U.S.C. § 1491. *Amell* v. *United States*, 384 U.S. 158 (1966), [Amell I]. We hold that on the peculiar facts and circumstances of this case the Commerce Department is required to pay the same wage increase as approved previously by the Navy for the reasons given below.

The wage agreement that is the cause of the dispute was originally effective between the NMU and the East Coast commercial shipowners on June 16, 1972. It provided, *inter alia*, as follows:

> a) Seamen whose base monthly wages are $515.35 or less for the contract year effective June 16, 1972, shall have added to their base monthly wages for the purpose of computing vacation pay, $15.00 per month for work

performed for the period from June 16, 1972 to June 15, 1973; $30.00 per month for work performed for the period June 16, 1973 to June 15, 1974 and $45.00 per month for work performed after June 16, 1974.

b) Seamen whose base monthly wages are between $515.36 and $631.53 for the contract year effective June 16, 1972, shall have added to their base monthly wages for the purposes of computing vacation pay, $25.00 per month for work performed for the period from June 16, 1972 to June 15, 1973; $50.00 per month for work performed for the period from June 16, 1973 to June 15, 1974 and $75.00 per month for work performed after June 16, 1974.

c) Seamen whose base monthly wages are over $631.53 for the contract year effective June 16, 1972, shall have added to their base monthly wages for the purposes of computing vacation pay, $35.00 per month for work performed for the period from June 16, 1972 to June 15, 1973; $70.00 per month for work performed from June 16, 1973 to June 15, 1974 and $105.00 per month for work performed after June 16, 1974.

As is well known, commercial vessels are kept moving and spend considerable amounts of time at sea. The necessary posts on board must be manned day and night and throughout the week. Accordingly, the "base" wage for a 40-hour week has no reality in relation to the normal earnings of the seaman, which comprise the base pay plus, for watch standers, a normal and predictible amount of overtime which from the management point of view, is unavoidable, however economically it desires to operate the ship. Vacation pay consisting of "base" pay only would put the seaman in a lower earning level during his vacation period and it is the object of the quoted agreement to diminish the impact of this, without eliminating it entirely.

The Navy's Military Sealift Command (MSC), in October 1972, agreed to pay the same wage increase, specified in the contract above, retroactively to June 16, 1972, with respect to Government owned, civilian manned vessels operating in the NMU Atlantic area.

However, NOA refused to pay the supplement (about $31,000 annually for approximately 468 NOS seamen) in any area. The Commerce Department approved this decision in a letter of the Director of Personnel on March 12, 1974.

The problem does not occur with respect to Pacific operations for a reason that will appear.

Plaintiffs subsequently brought this suit as an apparent test case under 5 U.S.C. § 5348 (Supp. II, 1972), and 28 U.S.C. § 1491, alleging a non-discretionary duty on the part of the Secretary of Commerce to pay the prevailing commercial rates or, in the alternative, an abuse of discretion in refusing to pay the prevailing commercial rates.

I

Section 5348 (formerly Section 5342, prior to Pub. L. 92–392 §1(a), August 19, 1972, 86 Stat. 572), provides as follows:

> § 5348. Crews of vessels.
>
> (a) Except as provided by subsections (b) and (c) of this section, the pay of officers and members of crews of vessels excepted from chapter 51 of this title by section 5102(c)(8) of this title shall be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates and practices in the maritime industry.
>
> (b) Vessel employees of the Panama Canal Company may be paid in accordance with the wage practices of the maritime industry.
>
> * * * * *

The operative words of Section 5348:

> * * * shall be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates and practices in the maritime industry, * * *

have remained unchanged since their enactment as part of the Classification Act of 1949, Pub. L. 81–429.

The legislative history under the 1949 Act is very brief on this section:

> The major prevailing-rate groups excluded from the bill are those mentioned in paragraphs (7), (8), and (9) of section 202. These are the trades, crafts, and labor employees, and officers and members of crews of vessels. (U.S. Code Cong. & Ad. News, 81st Cong., 1st Sess. 1949, at 2368).

The legislative history under the 1972 amendments is equally brief:

Crews of vessels

Section 5347 is a restatement of existing law relating to crews of vessels of the United States who are paid in accordance with practices of the maritime industry. However section 5347(*b*) has been amended to make vessel employees of Panama Canal Company subject to wage practices of the maritime industry and not merely authorize such pay, as is the case under existing law. (U.S. Code Cong. & Ad. News, 92d Cong., 2d Sess., 1972, at 2985).

However, the Navy provides considerable additional background into the statute and its operation. *See*, Appendix One to this opinion. Counsel for defendant has annexed this Navy statement to his brief, following a policy which we believe is of long standing and commendable, to allow a Department to advise the court of its position when that is contrary to the one the Attorney General has decided to take. Another time, it might be better for the agency statement to be signed and dated. The one we have here affords ample internal evidence of its authority and authenticity, and we rely on it heavily for its history of operation under the statute to be construed.

II

This is not the first time that this statute has been before the court. In *Benevento* v. *United States*, 198 Ct. Cl. 772, 461 F. 2d 1316, *cert. denied*, 409 U.S. 1038 (1972); *Beatteay* v. *United States*, 198 Ct. Cl. 989 (1972); *Benham* v. *United States*, 198 Ct. Cl. 990 (1972); *Daniels* v. *United States*, 187 Ct. Cl. 38, 407 F. 2d 1345 (1969); and *Amell* v. *United States*, 182 Ct. Cl. 604, 390 F. 2d 880, *cert. denied*, 393 U.S. 852 (1968), [Amell II], the broad Government discretion in fixing pay under Section 5348 was repeatedly upheld against seamen's challenges. These cases, except the last, involved the selection of the segment of the maritime industry to be treated as the model for comparison.

Counsel for defendant suggested in oral argument a difference between Commerce Department and Navy vessels in that the former spent more time in port, relatively, when night and day, week in and week out, watch standing was not required. This, if true, might make a difference, but must be disregarded here for lack of documentary substantiation,

and because it is not shown to have caused or been relevant to the difference in the position of the two agencies, as stated by their own representatives.

The Navy in Appendix One asserts that seamen on both coasts work normal 56-hour weeks if they are "watch standers" as opposed to "day workers." However, despite similar working conditions, different terminologies and contracts have been used by the West Coast and East Coast unions. On the West Coast, pay rates are negotiated on the basis of a 56-hour week, and leave is paid accordingly. The East Coast, for unexplained reasons, adheres to the conception used for shoreside jobs, describing the 56-hour normal work week for seamen in terms of 40-hours "straight time" and 16-hours "overtime". The effect of this variation in terminology was that until the 1972 contract, East Coast seamen received less vaction pay than West Coast seamen, for similar jobs with otherwise similar take-home pay. The former having their vacation pay computed on the basis of 40-hours weekly pay; the latter on the basis of a 56-hours weekly pay, that absorbed the overtime premium and distributed it over all the hours worked. The wage supplement granted the seamen on the East Coast by the contract helps realign their pay to be more nearly compatible with what West Coast seamen are paid for vacation pay. Both Government and commercial seamen take paid vacations of substantial length.

The Commerce Department does not tender any substantial issue as to relevant fact. It does not dispute the detailed submission by the Navy and by the NMU. It makes a semantic argument as to the statutes, which we have some difficulty in following, but will do our best to state. It seems to say that as used in Federal personnel law, "pay" means "base pay," whereas a broader term is required when Congress alludes to overtime, night and holiday differentials, etc. See 5 U.S.C. § 6301 and ff. (leave); 5 U.S.C. § 5544 (Wage Board overtime). The statutory leave for seamen "on extended voyages" is two days for each thirty days "of that service", 5 U.S.C. § 6305, plus regular leave accrual under § 6303. The inference seems to be that since the number of days on leave are fixed by statute, not by collective bargaining, the compensation per

day must be statutory also, and the statute in default of express provisions, by implication selects the base pay as the statutory vacation rate.

NMU points to specific practice where NOA has paid for overtime hours less than § 5544 would require, although that section tells exactly how overtime pay shall be calculated in relation to base pay. By its own terms it does not apply to § 5348 employees. See below. On the other hand, NOA pays for non-overtime Sunday work, a bargained rate, better than § 5544 and § 5546 would require, 50% instead of 25% over base pay. It would appear, therefore, that Commerce has regarded "pay" under § 5348 as more than "base pay", and we are given no clear consistent statement as to just what the "pay" under § 5348 does and does not include. We suggest the Commerce view that vacation pay is base pay only, really arises because that is what they are used to in the shoreside environment, and the semantics are but later rationalizations.

We think Congress meant to authorize Government agencies owning and operating ships, with civilian crews, to adopt private industry pay practices in their totality, as to differentials, overtime, premiums, or any other general pay practice that entered into and became a part of the seaman's take-home pay, subject of course to the "public interest" exception to be discussed presently. A partial and selective adoption of some but not all of such practices simply does not make sense with reference to any objective the Congress could conceivably have been seeking to achieve. Adoption of the base pay alone, or the base pay plus regular overtime, would be worthless, because these terms have meaning, and are counters used in bargaining, in the relationship they bear to all the factors in the equation. Bargainers may accept a detriment in one part of the pay package in exchange for a benefit in another, *i.e.*, they may take better premium pay for poorer base pay, or the reverse, as apparently happened in the Pacific. Interpretation of the statute to hold the seamen are bound by the concessions they made but don't get the bonuses they bargained for, is not likely to obtain industrial peace on the sea lanes, or further any other purpose.

Commerce's position is a classic instance of saying to Congress: "We see what you mean but you haven't used the

correct words to bring it about." As we said in *Anderson* v. *United States*, 203 Ct. Cl. 412, 420, 490 F. 2d 921, 925, *cert. denied*, 419 U.S. 827 (1974):

> * * * In statutory construction, unless the language is compelling, as it signally here is not, it is well to avoid interpretations no one can believe the Congress could have intended.

Amell [II], *supra*, is not to the contrary. Union members had voted to put all of a bargained pay increase into their pension fund. The nearest Government equivalent, its retirement system, was outside the reach of § 5348, and we held the Government ship operating agencies were not required to pay the increase directly to the seamen. We considered that fringe benefits outside of take-home pay were not "compensation." In this instance the construction of a perfect equivalent to industry practice is of course frustrated, but that does not warrant further and more extensive frustration imposed by semantic limitations upon the ordinary meaning of a simple word like "pay."

We note also that § 5348 requires the pay involved to accord with "prevailing rates and practices in the maritime industry." The Commerce view does not account for the word "practices" and allows it to add nothing to "rates."

Further the *Benevento*, *Beatteay* and *Benham* cases, *supra*, which affirmed the Interior Department in using a pay scale that obtained in the fishing industry with no premium pay for overtime whatever, undercut the Commerce Department's attempt to limit the application of § 5348 to base pay. By these cases § 5348 is also the source of any overtime rights the seamen have.

III

The Commerce Department's main position, that it would be illegal for it to pay the vacation pay supplement here involved, would, if right, require the conclusion that the Navy is illegally paying the same supplement, absent any showing of relevant differences. Government counsel conceded this. To us, however, the Navy position appears to be a good faith effort to effectuate the policy of the statute, based on an informed and reasoned analysis of the underlying facts.

If not the only possible position, it is at any rate well within the scope of discretion which, as our decisions recognize, the statute contemplates the employing agencies will exercise, not only as to the exclusion of practices it is not "consistent with the public interest" to conform to, but as to other questions as well. *E.g.*, *Daniels* v. *United States*, *supra*. Commerce's main position must be rejected.

IV

The Commerce Department retreat position is that it has determined the payment is inconsistent with the public interest "on several counts." It asserts, in effect, it has discretion and chooses to exercise it in a direction opposite to that of the Navy. This is perhaps only a little less cavalier towards a sister agency with longer experience with the kind of claim we have here, and greater involvement with it. Commerce says that use of two levels of "base pay" fouls up the computation of Government fringe benefits and various forms of employee contributions, *i.e.*, deductions. Moreover, Commerce anticipates its acquiescence in paying the supplement would set a bad precedent for acquiescence in future agreements that may have an impact on Federal employee benefits, although industry practices may not be consonant. Moreover, it is asserted that commercial crewmen are required to use their leave, whereas for Government employees it is for the most part optional.

With regard to the last argument, we suppose if a Commerce Department seaman refuses to take leave, though his services are for the time not needed, he is at any rate hardly likely to be ordered to work overtime. He will, therefore, lose take-home pay and need the supplement just as much as his commercial counterpart.

The Congress in enacting § 5348 recognized the unique character of the pay practices in the maritime industry. It saw that the pay practices existing shoreside with respect to Government employees would be a Procrustes bed if applied to Government vessels and to civilians employed as seamen thereon, union members doing the same work as their commercial counterparts. Its solution was to authorize pay practices to conform "as nearly as is consistent with the

public interest", not to Government shoreside practice, but to private industry practice afloat:

> * * * While it is common to defer to agency expertise in many matters, the agency charged with administering a statute may not adopt a position inconsistent with the enabling statute. * * * [Citing cases.] *Farrell Lines, Inc.* v. *United States*, 204 Ct. Cl. 482, 506, 499 F. 2d 587, 602 (1974).

Commerce manages to create present conflicts between its pay practices and others in three directions: (a) between Commerce and Navy civilian seamen, (b) between Commerce and commercial seamen, and (c) apparently, though the point is not developed in the record, between Commerce's own seamen on the East and West Coasts respectively. (We have shown that the involved supplement is needed to equalize Atlantic and Pacific vacation pay.)

We think the "public interest" exception was written to provide flexibility needed to eliminate anomalies and inequities that might arise from a too literal conformity to industry pay practices. It was not written to authorize a complete frustration of the Congressional scheme. Since Commerce relies so heavily on the imaginary horrible, let us too suggest one: if Commerce can do what it has done with the relatively minor vacation supplement, it can refuse to apply § 5348 in any part, declaring the entire wage scheme resulting from collective bargaining not to be "consistent with the public interest."

This case has much in common with *American Export Isbrandtsen Lines, Inc.* v. *United States*, 204 Ct. Cl. 424, 476, 499 F. 2d 552, 583 (1974), in which we held that the Maritime Administration, Department of Commerce, abused its discretion in refusing to include in allowable labor costs for subsidy purposes, certain so-called "severance pay" that was called for by a collective bargaining agreement similar to the one at bar. We quoted from the First Circuit as follows:

> The process of collective bargaining involves a give-and-take, with one party making a concession on one subject in return for obtaining a concession on another subject. It is difficult, if not impossible, for the parties to make a meaningful judgment as to the kind of bargain they are negotiating if one or more of the key provisions

> on which agreement turns is subject to invalidation by the Commission. * * *

In view of this factor, we viewed the disallowance as an abuse of discretion in the absence of valid reasons that could be urged in its support.

Conflict with determinations of other agencies is a factor to be considered in review of agency determinations. *Farrell Lines, Inc., supra.*

NOA issued a wage schedule on November 1, 1972, with retroactive effect to June 16, 1972. This was apparently its initial reaction to the new collective bargaining agreement of that date. On November 1, the Navy had already agreed to the vacation pay supplement. Counsel for defendant urges here that the first agency to act, perhaps precipitately, ought not to be able to bind the whole Government. We may agree with this, and yet hold the more dilatory agency may be required, to avoid abuse of discretion, to resolve the difference by discussion, or else obtain the decision of a common superior. If it just arbitrarily chooses to go a different way, the onus of abuse of discretion falls on it.

We should not be read as holding that there would have been no abuse of discretion if the Navy had taken the line that NOA subsequently did. Nor do we hold the contrary. The case is not before us and we express no opinion.

Commerce alleged nothing in its decision in support of its position on "public interest" that was not equally applicable to the Navy, nothing of any differences in the way their ships operate, or the amount of time they spend in port, for instance. Instead, *e.g.*, they say they will, if they yield, have a terrible time computing payroll deductions and contributions, life insurance benefits and contributions, retirement benefits, and lump sum payments for accumulated annual leave, in face of two levels of basic pay. The Navy, with the valor of ignorance, apparently, steamed into these mine-strewn waters two and a half years ago, and by now should have been blown-up, if the mines were really there. No instance of this occurring is reported. In stating its position, March 12, 1974, Commerce made no reference to any effort by it to ascertain the Navy experience and see whether it supports the existence of these asserted perils.

Whether there are really two levels of basic pay and other questions if any, that are pertinent, are problems we are compelled to suppose and do suppose the Navy has solved. Should there be some it has not, there remain the Comptroller General, the Civil Service Commission, and this court. In the circumstances we think the reasons assigned for asserting the "public interest" exception are mere rhetoric. We are not required to conjure up reasons to support an exercise of discretion when the agency has supplied none. We hold that Commerce has abused its discretion in making the determination here involved.

Accordingly, the defendant's motion for summary judgment is denied. The plaintiffs' cross motion for summary judgment is granted. Judgment is entered for the plaintiffs and the cause is remanded to the Trial Division for further proceedings under Rule 131(c) to determine the amount, if any, to be awarded to each of the 41 plaintiffs, consistent with this opinion.

KUNZIG, *Judge*, concurring:

Based on the facts of this case, I am compelled to concur. While it is possible that a factual distinction could be shown to justify different policy considerations for the Department of Commerce and the Navy, no such distinction has been asserted by the Secretary of Commerce here. Moreover, the mere raising of the possibility of such a factual distinction by Government counsel in the first instance at oral argument is too belated to require a trial at this time.

However, in an appropriate case on another day, this same result might not be mandated. If, as the Government has now asserted, these seamen employed by the National Oceanic and Atmospheric Administration (NOA), were at sea only 3 months of the year and did not, in fact, work overtime in a normal working week, then there would be no reason why this special wage supplement should be included in computing their vacation pay. Under such circumstances, were this supplement to be added, the vacation pay would then be higher than the normal weekly base pay received by NOA seamen instead of equal thereto.

On the facts timely presented for the purpose of deciding these cross-motions for summary judgment, no basis has been shown which would justify different policy considerations for the Department of Commerce and the Navy. Therefore, I concur in the opinion of the court.

APPENDIX ONE

NAVY STATEMENT

The Military Sea Transportation Service (now the Military Sealift Command) was established in 1949 as the single service manager for ocean transportation of the Department of Defense. MSC provides logistic support to battle fleet elements and a system of seagoing transportation for personnel and cargo for all elements of the DOD. It also operates ships in support of scientific research projects and other programs of DOD components and other government agencies.

Almost coincidental with the formation of MSC (then MSTS) the Classification Act of 1949 (63 Stat. 955, October 28, 1949) was passed. Chapter 782, Section 202(8) provided in pertinent part:

> This chapter * * * shall not apply to—
>
> * * * * *
>
> (8) officers and members of crews of vessels, whose compensation shall be fixed and adjusted from time to time as nearly as consistent with the public interest in accordance with prevailing rates and practices in the maritime industry;

This provision was the successor to the provision contained in the 1945 Federal Employees Pay Act which stated, in pertinent part:

> Employees of the Transportation Corps of the Army of the United States on vessels operated by the United States, * * * may be compensated in accordance with the wage practices of the maritime industry.

In 1966 the provisions were restated in 5 U.S.C. 5342, and in 1972 in 5 U.S.C. 5348. Thus, for all of its existence MSC has been *mandated* by Congress to compensate its seagoing employees * * * as nearly as consistent with the public in-

terest in accordance with prevailing rates and practices in the maritime industry.

From the very beginning of its existence MSC had difficulty in determining the "prevailing rates and practices" of the maritime industry for the simple reason that there was, and still is, no single uniform rate or practice in the industry. In 1949 MSC ships sailed in every ocean and sea in the world. MSC ship operating commands were located in New York, Honolulu, New Orleans, San Francisco and Seattle as well as in foreign countries such as Japan and Panama.

Rates of pay and pratices in the U.S. geographical areas were established by negotiation between ship owners and the labor organizations dominent in that area. After much study and review it was determined that MSC compliance with the congressional mandate could best be accomplished by establishing two basic sets of rates and practices, one for the Pacific Ocean area and one for the Atlantic Ocean area. Inasmuch as at the time there were at least five and as many as seven unions negotiating with ship owners on the several coasts, this required establishing 10–14 wage schedules. Within each schedule there were variations due to the size and power of the ship. Later, when MSC began operating tankers, additional classifications of pay were required. Now, in 1974, the situation has become somewhat less complex. Most of the large international officer unions have eliminated geographical differences so that, for example, Engineer Officers and Deck Officers have, geographically, uniform rates of pay. On the other hand, since the dominant union of unlicensed seamen on the West Coast is different from the East Coast union, MSC still maintains separate Pacific and Atlantic schedule of wages for unlicensed personnel. That this program generates much more administrative problems is evident; the decision to maintain the different schedules is based on SECNAV's policy to adhere as closely as possible to the Congressional mandate.

Apart from any consideration of MSC however, the differences in pay and practice between the East Coast and West Coast unions, although many and complex, in total result in approximately the same return for his labor to the seaman on each coast. That this is so is, of course, a fact of

union life; no union leader can persevere for very long, if his membership can find greener pastures elsewhere.

The mechanics of complying with the statute are deceptively simple; i.e., every time there is a change in compensation or practice in the maritime industry, MSC reviews it, determines if it is in the public interest, and if so, recommends to the Secretary of the Navy that it be adopted. Unfortunately the process is more complicated. Changes in prevailing rates and practices require constant careful monitoring to assure timely reaction to changes in the industry. Not every change, however, is within the scope of the act. For example, a recent change in the agreement between the Marine Engineers Beneficial Association, representing the licensed engineers, and the ship owners, provided for extra compensation to engineers on tankers during the period that cargo (oil) was being transferred to another ship at sea. In the past few years MSC has been engaged in underway fuel replenishment of combat ships. In this program MSC civilian marine employees have replaced military personnel on what were commissioned ships, and perform all the refueling duties heretofore performed by the military. Simultaneously, a test program was conducted with one or two commercial tankers, wherein these ships on opportune occasions would also refuel a combat ship. Since the Navy ships engaged in this program were more numerous, and were engaged in the refueling operation, day in and day out, in ships especially configured for underway fuel replenishment, it was felt that there was no practice prevailing in industry; rather, what prevailing practice there was was within [the] Navy. Similarly, because of the unique nature of many MSC operations, there is no counterpart operation in the private sector of the maritime industry. In such cases, MSC has had to recommend to the Secretary of the Navy and to the Department of Defense Wage Fixing Authority rates, and sometimes practices, interpolated from industry rates and practices.

In the matter under scrutiny, MSC in 1968 determined that a pay practice which had been negotiated in the private sector by the engineer and deck officers was within the scope of 5 U.S.C. 5348 (then 5342) and recommended its adoption to the Secretary of the Navy. It was approved by the De-

portment of Defense on 8 November 1968 retroactively to 16 June 1968. To understand the ramifications of this change, some preliminary information is necessary.

a. Duty hours of deck or engineer officers in a ship at sea are eight in a spread of 24; usually worked 4 hours on duty, then 8 hours off. For example, an engineer on watch will work from midnight until 0400 (4 a.m.) and then be relieved. He returns to duty at 1200 (noon) and works until 1600 (4 p.m.). This pattern is repeated for all watchstanding officers and non-officers seven days a week, because obviously a ship at sea does not come to rest on weekends. Regardless of the time of the watch worked the weekday watches are on "regular" or "straight" time. That is, the first 40 hours which are served Monday through Friday are at the level of pay authorized for the position. The 16 hours worked on weekdays [weekends] are overtime hours and are so compensated. Thus, every watchstanding officer is, for all intent and purposes, guaranteed 16 hours of overtime a week while at sea. There are, however, some deck and engineers [engineer] officers who do not stand watches, and who therefore do not receive this weekend salary. These are usually the senior officers; the Master, First Officer, Chief Engineer and First Assistant Engineer. So that there would be a financial incentive to aspire to and to remain in these positions, the unions and the maritime industry, through negotiation over the years have compensated the incumbents of these non-watchstanding positions by including *in their base pay* a sum known in the industry as "non-watchstanding compensation". The choice of this name is, perhaps, unfortunate. It does not represent payment for work not performed; it is an industry pay practice established in recognition of a need to insure that supervisors are paid at least as much as their subordinates, and in recognition, insofar as the Master and Chief Engineer are concerned, of the fact that they are on duty 24 hours a day. Another point which must be remembered is that the non-watchstanding compensation received by the officers described above does *not* represent their overtime rate multiplied by 16 hours a week. For example, the overtime rate of a Chief Engineer, Class A3, is $20.07 per hour. If he were to [be] paid this rate for 69⅓ hours a month, his non-

watchstanding compensation would be $1,391.50. Instead it is less than half this figure, $649.19.

Prior to the 1968 changes in the industry practice, the differences in wages paid aboard ship and the wages paid during vacation periods were either negligible for those who received non-watchstanding compensation or exceedingly large for those who were accustomed to receive 16 hours of overtime a week. The first group, whose rate of pay for the position included the non-watchstanding compensation, gave up only that additional premuim pay that was forthcoming because of some unusual work performed; the other group were paid leave only at their regular Monday to Friday rate. This represented, over a month, a loss of approximately 40% of their regular earnings on ship. In the 1968 negotiations, therefore, the unions sought to equalize, to some extent, the "take home" pay of this group. It can also be assumed that the unions desired to make the vacation periods more desirable, as a mechanism to induce shipboard officers to go on leave and thus make work for their unemployed brethren. In any event, effective 16 June 1968, those officers who were accustomed to working weekend watches aboard ship were granted 2 benefits, among others. The first was an additional 15 days a year vacation; the second was an increase in their vacation rate of pay. This increase, although called non-watchstanding compensation, is not equivalent to their normal overtime earnings; again, it represents less than 50% of that amount.

In the case of the unlicensed personnel on the East Coast a somewhat similar set of facts obtained before June 1972. The unlicensed deck or engine seamen in a commercial ship are either watchstanders or day workers. The watchstanders are guaranted 16 hours [a] week overtime; the day workes are not. Traditionally, therefore a day worker's rate of pay is higher than that of watchstander. For example, the monthly rate of pay in 1972 of a Watchtsanding Able Seaman was $544.88; the rate of pay of a day-working Able Seaman (Maintenance) (a rating which has the identical requirements and whose incumbents are interchangeable with ABs) was $619.77. In the real world of a ship at sea, however, practically every unlicensed crewmember works

some overtime, whether he is a day worker or not. Obviously, cooks and stewards must perform their duties every day of the week; the ship's maintenance is rarely, if ever, up-to-date, etc. Thus, review of a ship's payroll will show a considerable amount of earnings over and above the established rate for every officer and crew member. As in the case of the watch officers before 1968, these additional overtime wages were lost when the employee went on vacation.

So that this overview can be seen in the right perspective it is necessary to depart briefly from the narrative to discuss two pertinent aspects of the marine wage system. First, every maritime union in the American maritime picture has consistently and successfully sought to expand vacation benefits for its membership. At this time, for example a merchant seaman sailing in a commercial ship for 6 consecutive months will earn paid time off, depending upon his rating, as little as 8 weeks and 4 days, up to 19 weeks and 2 days! (Parenthetically, MSC crewmembers who earn leave based on years of service will accumulate annual, sick, and shore leave for the same period of between 5 weeks and 6 weeks 1½ days!). The pressure on the unions to seek additional vacation benefits stems from a desire to spread work among unemployed seamen and to make seagoing a more acceptable occupation. The old days of long in-port visits to glamorous cities in far-away places is fast disappearing. Ships earn profits only at sea. The tendency for modern ships is unload/load in the shortest time possible and then get back to sea. Some large tankers never actually dock in a port. They are loaded and unloaded by fuel lines stretching into a anchorage area. As a result, crewmembers are lucky to get a few hours, if any, ashore during a long voyage.

The other aspect of the pay picture is the compensation practice on the West Coast. In that area, unions of unlicensed seamen and management have negotiated a wage rate based on a 56 hour a week. This rate recognizes that shipboard employees usually work every day at sea; the important aspect of this pay rate, for the purpose of this discussion is that it is paid for all vacation time.

To return to the narrative, then, we see in the unlicensed crewmember situation, before 1972, on the East Coast, a

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picture of longer (and it must be said, mandatory) vacations at a rate of pay far below the individual's customary earnings. His counterpart on the West Coast, on the other hand enjoys a fairly constant rate of take home pay. Small wonder that in 1972, the dominant East Coast union negotiated what is called in their agreement with East Coast ship owners a "monthly base wage for vacation only". This vacation base rate is calculated by adding an agreed upon sum, which in 1973 varied between $30 and $70 and in 1974 between $45 and $105, to the regular shipboard rate. In the case of the unlicensed unions as well as in the case of the officer unions, the negotiations with ship operators typically treat the matter of days of vacation apart and separately from rates of pay for vacation.

In 1968 MSC was given approval by SECNAV/DOD to increase the rate of leave pay of licensed deck and engineer officers by an amount reached by applying the industry non-watchstanding formula. In 1972, MSC was given approval to match the monthly base wage for vacations only, agreed upon between the shipping interests and the dominant East Coast unlicensed union. The approval related only to MSC ships operated by COMSCLANT.

* * *

[Legal argument omitted.]

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511 F. 2d 548

MEVA CORPORATION v. THE UNITED STATES

[No. 492–69. Decided February 19, 1975]

ON THE PROOFS

Contracts; breach; refusal to permit substitution of subcontractor; damages; estoppel or waiver; jury verdict; AGC v. booked equipment costs; overhead; profit.—Plaintiff was the successful bidder on a contract for constructing a transmission line running from Winona to Scottsdale, Arizona. The Invitation for Bids included a Special Condition clause requiring that a bidder submit with his bid the firm name and address of each subcontractor to whom a subcontract would be awarded for each category of work listed, and further provided that no substitution for any named subcontractor

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would be permitted prior to award and only in unusual circumstances after award and then only upon a showing by the contractor of complete justification therefor and upon approval by the contracting officer. The bid of the subcontractor, which plaintiff listed for the clearing and footings work, reached plaintiff the evening before bid opening, and there was thus little or no time for a prebid investigation of the financial status of the subcontractor. Plaintiff's bid did not reflect the subcontractor's bid figures but instead plaintiff's own bid figures for such work. Shortly after bid opening plaintiff concluded that the subcontractor, because of its poor financial condition, would be incapable of performing the work, and 4 days after contract award inquired at defendant's Phoenix office about the possibility of substituting another subcontractor or of doing the work itself. The subcontractor informed the Phoenix office that plaintiff was bid shopping and made other allegations re pre-bid promises. The contracting officer was advised of the foregoing. In the period of time of a little over a month the contracting officer twice denied plaintiff's request for approval of substitution on the ground that to obtain his approval plaintiff would have to show some change in the subcontractor's circumstances after bid opening. There was no reservation of decision pending presentation of further facts. Plaintiff proceeded by way of a subcontract with the subcontractor; the latter subcontracted the clearing work which was satisfactorily completed but failed to make progress on the footings work because it lacked financial capability and resources. The subcontract was terminated and plaintiff completed the work itself without objection from defendant. Plaintiff contends that defendant's refusal to permit it to substitute another subcontractor or to do the work itself constituted a breach of contract entitling it to damages. It is *held* (1) that the contracting officer acted arbitrarily and capriciously and in breach of its contractual obligations to plaintiff in his refusal to permit substitution, in the circumstances of this case; (2) that plaintiff's claim to resulting damages is barred by neither estoppel nor waiver; (3) that while plaintiff's total cost method of computing the amount due is inappropriate, the record shows that plaintiff suffered substantial monetary damage in direct consequence of defendant's breach of contract, and it is sufficient to permit the extent of such damage to be ascertained by way of a "jury verdict" with a reasonable degree of accuracy; (4) that since plaintiff has failed to prove that its actual, booked costs are inadequate or incomplete or do not represent the full costs rightly attributable to the contract, the use of actual, booked equipment costs is proper here rather than AGC equipment costs; (5) that plaintiff is entitled to a reasonable overhead factor; (6) that a profit factor may not be taken into account in reaching a "jury verdict"; and (7) that, based on the record as a whole, plaintiff was damaged in the amount of $600,000 and judgment is entered in that sum.

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Contracts; contracting officer; finality of contracting officer's decision.

[1] Where the contracting officer in refusing plaintiff's request for substitution of subcontractor notified plaintiff that there appeared to be no change in circumstances existing at the time of or following bid submission to justify substitution of subcontractor under the Special Condition clause of the Invitation for Bids, a subsequent letter from plaintiff advising the contracting officer that it was proceeding as his decision required but that it might again request reconsideration should it be unable to comply with that decision, did not detract from the finality of the contracting officer's ruling denying the request.

United States ⟸ 73(15)

Contracts; contracting officer; discretion of contracting officer, abuse of discretion.

[2] The Special Condition clause of the Invitation for Bids requiring a bidder to submit with his bid the firm name and address of each subcontractor he intended to use and providing that no substitution for any named subcontractor would be permitted prior to award and only in unusual situations after award, and then only upon a showing by the contractor of complete justification thereof and approval by the contracting officer, while vesting in the latter a considerable measure of discretion, was not intended to be absolute. Thus, where the contracting officer refused to permit plaintiff to substitute another financially able subcontractor or itself when he knew or should have known that the named subcontractor was at least a financial risk, under the circumstances of this case the contracting officer's discretion was exercised arbitrarily, capriciously and in breach of his obligations to plaintiff.

United States ⟸ 73(12)

Contracts; breach; waiver of breach; continued performance.

[3] A party may waive a breach of contract as an excuse for nonperformance, proceed with the contract, and still retain a cause of action for damages. Where plaintiff unsuccessfully protested the contracting officer's refusal to permit plaintiff to substitute itself or another subcontractor because plaintiff considered the present one a financial risk, and thereafter plaintiff proceeded, as it was entitled or required to do, by dealing with the subcontractor as best it could, plaintiff's suit for damages on the ground that the contracting officer breached his contractual obligation to plaintiff in refusing to permit substitution is not barred by waiver of the breach.

United States ⟸ 74(6)

Contracts; damages; measure of damages; total cost theory; when appropriate.

[4] The total cost method of computing the amount of damages due a contractor for breach of contract has never been favored

by the court and has been tolerated only when no other mode is available and when the reliability of the supporting evidence is fully substantiated.

United States ⇐ 74(13)

Contracts; damages; jury verdict.

[5] Implicit in the "jury verdict" herein is the necessity for resolution of the conflicting claims of the parties as to several factors to be weighed in reaching such a verdict: for instance, whether AGC or booked equipment costs are to be considered, the propriety of considering unbilled corporate charges (and a profit factor) *vel non;* and the appropriate method of viewing plaintiff's clearing costs.

United States ⇐ 74(13)

Contracts; damages; measure of damages; equipment costs; booked v. AGC.

[6] Where actual, booked equipment costs are available, AGC equipment costs may not be considered in assessing plaintiff's damages. In the absence of a regulation or directive, the burden is on the party seeking to substitute AGC costs for the contractor's own actual, booked costs to demonstrate that the contractor's own costs (as shown) are inadequate or incomplete or do not fairly represent the full costs rightly attributable to the particular contract.

United States ⇐ 74(13)

Contracts; damages; measure of damages; profit on damages.

[7] A contractor may not recover profit on the amount of damages awarded for breach of contract.

United States ⇐ 74(13)

Stuart G. Oles, attorney of record, for plaintiff. *Allen, DeGarmo & Leedy*, of counsel.

John A. McWhorter, for the Associated General Contractors of America, *Amicus Curiae. Harold I. Rosen* and *King & King, Chartered*, of counsel.

George M. Beasley, III, with whom was *Assistant Attorney General Carla A. Hills*, for defendant. *David R. Schlee*, of counsel.

Before DAVIS, KASHIWA and KUNZIG, *Judges.*

PER CURIAM: This case comes before the court on exceptions by the plaintiff and the defendant to the recommended decision, filed January 11, 1974, by Trial Judge Harry E. Wood pursuant to Rule 134(h). The court has considered the case on the briefs and oral argument of counsel for the parties

and the *Amicus Curiae*. Since the court agrees with the recommended decision of the trial judge, as supplemented by the court, and as hereinafter set forth, it hereby affirms and adopts the recommended decision, as supplemented, as the basis for its judgment in this case. Therefore, plaintiff is entitled to recover and judgment is entered for plaintiff in the sum of $600,000.

OPINION OF TRIAL JUDGE

WOOD, *Trial Judge:* In this contract action, plaintiff, a California corporation, contends that in the facts and circumstances of this cause defendant's refusal after contract award to permit plaintiff either (1) to substitute another subcontractor for one listed by plaintiff in its bid as the subcontractor who would (should plaintiff be awarded the contract) perform clearing and footings work, or (2) to perform the clearing and footings work itself, constituted a breach of contract, and that defendant is accordingly liable to it for its resulting damages, alleged to amount to some $1,600,000.

Defendant's position is that the Contracting Officer never rendered "a decision that was final as to the contractor's right to substitute"; that, assuming *arguendo* the Contracting Officer did make "an arbitrary and final decision", plaintiff's claim for resulting damages is nonetheless barred by estoppel or waiver; that in any event plaintiff's "total cost" approach to the problem of damages is deficient; and that, there being "no other competent proof of damages, plaintiff cannot recover." [1]

For the reasons which follow, it is concluded that plaintiff is entitled to recover, in the amount of $600,000.

I

Early in 1964, defendant, acting through the Bureau of Reclamation, Department of the Interior, issued an invitation for bids (IFB) for the construction and completion of a proposed "Flagstaff-Pinnacle Peak" 345-kilovolt transmission line running from near Winona, Arizona, to the Bureau of Reclamation's Pinnacle Peak Substation some 14

[1] Defendant's Brief, pp. 5, 12, 34.

miles north of Scottsdale, Arizona. Bids were to be opened in Phoenix May 12, 1964.

The IFB indicated that the work to be performed (which included, *inter alia*, clearing and footings work) was to be divided into two schedules, each approximately 57 miles in length; that work should begin within 30 calendar days after the contractor's receipt of notice to proceed; and that all of the contract work should be completed within 630 days from the date of receipt of such notice. The IFB also included Special Condition 24, Specifications No. DC–6090, "Listings of Subcontractors", the genesis of this litigation.

Briefly, paragraph b of Special Condition 24 required that a bidder submit with his bid the firm name and address of each subcontractor to whom a subcontract would be awarded for each category of work listed in a "Supplement to Bid Form, S.F. 21—List of Subcontractors". Paragraph b further stated that, "Except as otherwise provided herein, the bidder agrees, if awarded the contract, not to contract to have any of the listed categories of work performed by any subcontractor other than the subcontractor named for the performance of such work." Special Condition 24 also provided in part as follows:

> e. No substitution for any named subcontractor will be permitted prior to award, and only in unusual situations after award and then only upon the contractor's submission, in writing, to the Contracting Officer of a complete justification therefor and after obtaining the Contracting Officer's written approval thereof. * * *

Mr. S. M. Rivers, who had become an employee of plaintiff on April 27, 1964, was responsible for the preparation of plaintiff's bid on the proposed transmission line. Despite his intent to subcontract the clearing and footings work, Mr. Rivers proceeded on his own to prepare a prime contract bid for plaintiff. He endeavored to obtain bids on the clearing and footings work, and as part of this effort solicited a bid from a Mr. Hal Perry, a Phoenix contractor doing business as Sun States Contracting Company. Mr. Rivers received a bid from Sun States on the evening of May 11, 1964, the day before bid opening.

Perhaps because of the timing of the Sun States bid, plaintiff's prime contract bid to defendant did not reflect Sun States' bid figures on the clearing and footings work (a total of about $1,523,000), but instead contained Mr. Rivers' own higher bid figures for that work (a total of about $1,864,000).[2] In bidding on the proposed transmission line, Mr. Rivers, for plaintiff, did list Sun States (as "Sun States Construction Co.") as a subcontractor for both clearing and footings work pursuant to Special Condition 24, *supra*. At some time prior to coming to work for plaintiff, Mr. Rivers had checked Mr. Perry's "credit" and had found it to be "slow but good". No further pre-bid investigation of either Mr. Perry's or Sun States' financial situation was then made.

At bid opening May 12, 1964, plaintiff's bid of $6,148,581 on the proposed transmission line was within about $115,000 of defendant's engineer's estimate (of some $6,265,000), but was about $850,000 less than that of the next lowest bidder, a construction company which had just completed a parallel transmission line along the same right-of-way. Plaintiff was awarded a contract for construction of the Flagstaff-Pinnacle Peak 345-kilovolt transmission line, at an estimated price of some $6,133,000, June 5, 1964.

In the meantime, and following May 12, 1964, plaintiff had begun to investigate Sun States' financial situation. After an unsuccessful effort to obtain information from Mr. Perry, receipt, on May 20, 1964, of a financial report showing Mr. Perry's net worth to be rather small, and advice on June 9, 1964, from Sun States that it had secured a line of credit at a Phoenix bank (and from the bank that there was no such line of credit), two of plaintiff's representatives visited the Bureau of Reclamation's office in Phoenix on June 9, 1964, to inquire about the possibility of substituting another contractor for Sun States (whose financial condition was then mentioned) or of doing the clearing and footings work itself.

During this same period of time, however, representatives of Sun States, in conversations with representatives of defendant in Phoenix, had made a number of allegations re-

[2] Plaintiff's bid to defendant on the footings portion of the work was however, some $145,000 less than Sun States' bid to plaintiff on that portion of the work.

specting plaintiff. Among other things, defendant was told that plaintiff was trying to "dump" Sun States, and that plaintiff was "bid shopping". The latter term describes a situation where, after bid opening and award, a successful government prime contract bidder who has utilized a particular potential subcontractor's bid figure in submitting its prime contract bid "shops" the subcontract work to other potential subcontractors in an effort either to obtain from another subcontractor a lower price for the work to be subcontracted or to drive down that of the subcontractor whose figures were used in computing the prime bid.

The Office of the Chief Engineer of the Bureau of Reclamation ("the Contracting Officer"), in Denver, Colorado, was promptly advised by his subordinates in Phoenix of the substance of Sun States' assertions about plaintiff, and of the comments and questions of plaintiff's representatives at the Bureau's Phoenix office on June 9, 1964.

On June 12, 1964, by letter to the Contracting Officer, plaintiff requested "permission to withdraw the name of the sub-contractor [Sun States] which we listed in our Bid Documents submitted May 12, 1964." Plaintiff's said letter further stated that:

> Our detailed examination of the financial resources of this Corporation reveals that, in our opinion, they are inadequate to support performance of this sub-contract. We have examined the Corporation's financial statement and the personal financial statements of the Officers, have discussed this matter with the Sun States banking affiliate—The Valley National Bank, Mr. Norman J. Miles, Assistant Vice President, and have also obtained Dun and Bradstreet Reports. We believe that the satisfactory performance of this work covered by this subcontract would be seriously affected by this lack of financial stability.
>
> If approval is obtained for this withdrawal, we intend to provide a sub-contractor or contractors of definite financial responsibility or will provide performance by our own organization.

By letter dated June 15, 1964, defendant gave plaintiff written confirmation of a telephonic postponement of a preconstruction conference scheduled for June 17, 1964, and advised plaintiff that the conference would be rescheduled

when its request to withdraw Sun States had been resolved.

By letter dated June 17, 1964, from the Contracting Officer, plaintiff was advised in pertinent part that:

> It appears that there has been no change in the circumstances existing at time of submittal of your bid to justify substitution of subcontractors as requested. Accordingly, approval of any substitution is denied.

While the Contracting Officer had concluded by June 17, 1964, that plaintiff might be "bid shopping", defendant's representatives made no effort, at any time during the period 1964–66, to ascertain whether or not Sun States' allegations with respect to plaintiff had any basis in fact. There is no credible evidence in the record of "bid shopping". Moreover, the proof establishes that plaintiff was never told by anyone, prior to 1967, that Mr. Rivers or plaintiff had supposedly made any pre-bid promises to Sun States with respect to financing or bonding, as Sun States was asserting to defendant in mid-1964.

On June 24, 1964, at plaintiff's request, a conference between representatives of plaintiff and the Contracting Officer (and other representatives of defendant) was held in Denver, Colorado. The Contracting Officer was then told that plaintiff, having received Sun States' bid just prior to bid opening, had been unable to make a pre-bid appraisal of Sun States' capabilities, that Sun States had no financing and could not make bond, and that plaintiff wanted either to obtain a subcontractor with adequate financing to do the clearing and footings work or perhaps to do that work itself. A decision under Special Condition 24 was requested.

While plaintiff was then told that Sun States had approached defendant in opposition to any possible substitution for Sun States by another subcontractor (or by plaintiff), none of Sun States' assertions to defendant about plaintiff (and one of those assertions, of pre-bid promises with respect to financing and bonding, at least tended to confirm Sun States' financial instability) were even mentioned. The Contracting Officer reiterated that, absent a showing of some change in Sun States' circumstances following bid opening, any substitution for Sun States was

unjustifiable, and that plaintiff's doing the work itself "would be considered a substitution."

In consequence of that position, plaintiff did not give the Contracting Officer documents respecting Sun States' financial condition it then had, and to which its June 12, 1964 letter to the Contracting Officer had referred. Had plaintiff done so, however, it would have made no difference. Even with clear proof of Sun States' insolvency in June 1964, the Contracting Officer would have denied plaintiff's request had Sun States been equally insolvent May 12, 1964, since only a postbid change in circumstances was, in his judgment, an "unusual" situation within the meaning of Special Condition 24.

Thereafter plaintiff entered into negotiations with Sun States with a view to reaching a subcontract with Sun States, and it eventually did so July 15, 1964. Two days later, on July 17, 1964, the Contracting Officer gave plaintiff notice to proceed with the work covered by the contract in suit.

In the meantime, on July 9, 1964, plaintiff had written to the Contracting Officer to advise that subcontract negotiations with Sun States were in process, but that, should they fail, the Contracting Officer would probably receive a request for reconsideration of his denial of plaintiff's request to "substitute the proposed subcontractor, or that the work be performed by ourselves." In the latter connection, plaintiff asked for an interpretation of the language of Special Condition 24 relating to substitution of subcontractors as it pertained to work performed by a prime contractor.

The Contracting Officer's response, some days after a preconstruction conference attended by representatives of plaintiff, Sun States, and defendant had been held, was in substance that plaintiff was precluded by Special Condition 24 from doing the clearing and footings work, and that if plaintiff should decide not to enter into a subcontract with Sun States, and instead request approval "for substitution of yourself as prime contractor for work previously listed for performance by that subcontractor, I will be glad to give you a formal and final decision on the matter upon request being made therefor."

Sun States subcontracted the clearing work, at a price of $210,000,[3] and that work was completed without any apparent difficulty or delay. The footings work, however, did not proceed so well.

For liability purposes, it suffices to say that Sun States never achieved the required production rate of 10 miles of footings work per month, in fact completing no more than 10 miles of footings work during the period August-December 1964. The basic reason for Sun States' failure to make progress was a lack of financial capability and resources, *i.e.*, it did not have enough personnel, equipment, or material on the project to do the footings work at the required rate of progress.

By agreement dated December 23, 1964, between plaintiff and Sun States, the subcontract between the two was terminated effective December 31, 1964. Sometime in January 1965 defendant was orally advised of the termination agreement, and made no objection either to that agreement or to plaintiff's intent to complete the footings work itself. Plaintiff completed the subcontract work in 1965.

Plaintiff contends that defendant's refusal to permit it to substitute either another subcontractor, or itself, for Sun States constituted a breach of contract entitling plaintiff to recover for any damages thereby caused, on the grounds (1) that having shown an "unusual" situation constituting a "complete justification therefor * * *", it was entitled, pursuant to Special Condition 24, to replace Sun States; (2) that the Contracting Officer acted arbitrarily and capriciously, and under the influence of "bid shopping" charges, in denying its requests to substitute for Sun States, neither informing plaintiff of those charges nor affording it an opportunity to respond to them; (3) that by compelling plaintiff to subcontract with Sun States, defendant breached its implied obligation not to hinder plaintiff, or to render its performance more costly; and (4) that defendant's refusal to permit plaintiff to do the work itself was in any event a breach of contract.[4]

[3] Plaintiff's bid price to defendant on the clearing work was $920,000; Sun States' bid price to plaintiff on the clearing work was $435,000.

[4] Plaintiff candidly disclaims any challenge to the Contracting Officer's integrity, asserting rather that his actions and judgments in the matter failed to comport with his contractual obligations to plaintiff.

Defendant argues, however, that the Contracting Officer "never rendered a decision that was final as to the contractor's right to substitute"; [5] that plaintiff subcontracted with Sun States without any "force, compulsion, or duress by the Contracting Officer"; and that, if the union between the two were unwilling to any degree, the cause was pressures by Sun States on, and concessions from Sun States to, plaintiff, with defendant playing no part in the matter. Defendant's view of the facts leading to plaintiff's subcontract with Sun States is not a tenable one.

Winter work on the northern half of the proposed transmission line, in northern Arizona, is, because of altitude and terrain, virtually impossible. Plaintiff had therefore originally planned to commence clearing and footings work on the northern end of the project in mid-June 1964, and to proceed south without interruption, completing these portions of the work in about a year.

When plaintiff notified defendant on June 12, 1964, of its desire to "withdraw" Sun States, defendant immediately postponed a preconstruction conference scheduled for June 17, 1964. Moreover, that request, albeit not the only factor, clearly affected the timing of defendant's issuance of a notice to plaintiff to proceed with the contract work on July 17, 1964, two days after plaintiff's agreement with Sun States.

In the period of time between June 12 and July 17, 1964, the Contracting Officer twice denied plaintiff's request for approval of substitution on the ground that to obtain his approval plaintiff would have to show some change in Sun States' circumstances after bid opening. There was neither a reservation of decision pending presentation of further facts, nor anything tentative about these rulings. In all the circumstances then facing plaintiff, it reasonably concluded that it had no choice but to proceed as it did by way of a subcontract with Sun States, on terms as favorable to plaintiff as it could obtain.

Defendant's reliance on plaintiff's July 9, 1964 letter to the Contracting Officer as showing that the matter of substitution remained unresolved after June 24, 1964, fails. In

[5] Defendant's Brief p. 5.

that letter, plaintiff, recognizing the Contracting Officer's position, simply advised him that it was proceeding as his decision required, but that it might again request reconsideration should it be unable to comply with that decision. Nothing therein detracts from the finality of the Contracting Officer's earlier rulings.

Thus, plaintiff's contention of breach of contract by defendant's refusal to permit it to substitute either another subcontractor or itself for Sun States may not be finessed on the ground that plaintiff's dealings with Sun States were the product of choice, untainted by a final decision of the Contracting Officer denying plaintiff's request for substitution.

It is, of course, apparent that Special Condition 24, to which plaintiff agreed in submitting its bid, vested in the Contracting Officer a considerable measure of discretion. That discretion, however, was not, and cannot have been intended to be, absolute. See *General Electric Co.* v. *United States*, 194 Ct. Cl. 678, 440 F. 2d 420 (1971); *Argonaut Insurance Co.* v. *United States*, 193 Ct. Cl. 483, 434 F. 2d 1362 (1970). And, it is clear from the record in this case that that discretion was exercised arbitrarily, capriciously, and in breach of the Contracting Officer's obligations to plaintiff. *General Electric Co.* v. *United States*, *supra;* see also *Hardeman-Monier-Hutcherson* v. *United States*, 198 Ct. Cl. 472, 487, 458 F. 2d 1364, 1371–72 (1972); *Penner Installation Corp.* v. *United States*, 116 Ct. Cl. 550, 89 F. Supp. 545, *aff'd* 340 U.S. 898 (1950).

While plaintiff did receive one other bid on a portion of the footings work, Sun States was the sole bidder to plaintiff on the clearing and footings portion of the proposed contract work. Sun States' bid reached plaintiff on the evening before bid opening. There was obviously little or no time for any investigation of Sun States by plaintiff. Even its corporate name was inaccurately listed in plaintiff's bid documents, and plaintiff's, not Sun States', bid prices for clearing and footings work were used.

When, shortly after bid opening, plaintiff came to the conclusion that Sun States lacked adequate financial resources to perform a subcontract for the clearing and footings work—

a conclusion which the events of the following several months proved devastatingly accurate—it twice sought the Contracting Officer's permission, on this ground, to substitute someone else for Sun States. Sun States' allegations to defendant of promises by plaintiff as to bonding and financing bore out Sun States' own financial instability.

The Contracting Officer knew, or should have known, that Sun States was at least a risk. Notwithstanding, he neither advised plaintiff of Sun States' allegations to defendant about plaintiff, and thereby in effect denied plaintiff an opportunity to refute them, nor even tried to find out whether those allegations had any basis in fact. Perhaps influenced by alleged (but clearly not proven) bid shopping, he simply insisted that a post-bid change in circumstances must be shown to obtain his approval for substitution pursuant to Special Condition 24.

In all of the facts and circumstances of this cause, the Contracting Officer acted arbitrarily and capriciously, and in breach of his contractual obligations to plaintiff, in thus denying plaintiff's requests for substitution. See *General Electric Co.* v. *United States*, *supra; Argonaut Insurance Co. v. United States*, *supra; Penner Installation Corp.* v. *United States*, *supra.*

Plaintiff also vigorously urges that by compelling plaintiff to subcontract with an incapable subcontractor, defendant violated its implied obligation not to hinder plaintiff, nor to render its performance more costly. *Cf. Space Corp.* v. *United States*, 200 Ct. Cl. 1, 10, 470 F. 2d 536, 541 (1972); *Dale Constr. Co.* v. *United States*, 168 Ct. Cl. 692, 700 (1964); *Commerce International Co.* v. *United States*, 167 Ct. Cl. 529, 536, 338 F. 2d 81, 85 (1964). Except for denying that the Contracting Officer rendered a final decision requiring plaintiff to subcontract with Sun States, defendant does not really controvert this argument. In view of the conclusions hereinabove set forth, however, the issue need not be, and is not, here reached.

Defendant does contend that, should the court conclude that the Contracting Officer did render a final and arbitrary decision, the claim herein is nonetheless barred by the doctrines of estoppel or waiver. These contentions have no merit.

One argument is that by its letter of July 9, 1964, plaintiff somehow lulled the Contracting Officer into believing that plaintiff no longer sought to submit facts necessary to justify a final decision in its favor. This is specious. The Contracting Officer had twice told plaintiff that only a post-bid change in circumstances would be considered. Plaintiff obviously could not make such a showing, and it had in effect told the Contracting Officer just that. The notion that plaintiff somehow lulled or misled defendant lacks any foundation.[5a]

Defendant also urges that by failing to advise it that plaintiff was contracting with Sun States under protest or disagreed with the Contracting Officer's decision, and by failing to go over the Contracting Officer's head administratively, in 1964, plaintiff is "estopped, by acquiescence or otherwise, from basing a claim upon the actions or inactions of the Contracting Officer." [6]

Plaintiff's June 24, 1964, request for reconsideration was itself clearly sufficient to show the Contracting Officer that plaintiff protested, and disagreed with, his decision. Moreover, the Contracting Officer knew, or should have known from what Sun States and plaintiff had both told him, that withholding approval for substitution might well result in a claim. The proposition that plaintiff's failure to "appeal" is a bar is supported neither by authority nor logic.

Defendant further asserts that plaintiff acquiesced in "the Contracting Officer's position that, where the subcontractor was alleging prebid understandings concerning financing of the subcontract work, the complete facts surrounding such understandings must be brought out before substitution on the ground of 'financial instability.'" [7] This position falls, on the facts found.

Finally, *Harvey Radio Laboratories, Inc.* v. *United States*, 126 Ct. Cl. 383, 115 F. Supp. 444 (1953), *cert. denied*, 346 U.S. 937 (1954), and *Ling-Temco-Vought, Inc.* v. *United*

[5a] Plaintiff was then proceeding on the assumption that the controversy could well be one arising "under the contract" which would be remedied administratively. On that assumption, the disputes clause required that the contractor proceed as the Government directed, pending resolution of the dispute. [footnote by the court]

[6] Defendant's Brief, p. 19.

[7] Defendant's Brief, p. 20.

States, 201 Ct. Cl. 135, 475 F. 2d 630 (1973), cited by defendant as controlling on the estoppel question, are, on this record, wholly inapposite. *Cf. Petrofsky* v. *United States*, 203 Ct. Cl. 347, 488 F. 2d 1394 (1973). No sound reason for invoking the doctrine is suggested, or appears.

Defendant also avers that waiver should be applied, asserting that the "law requires a contractor who claims the Government has committed a material breach of the contract to give prompt notice of such claim, and to state that it is continuing performance under protest if it elects to preserve its remedy."[8] As plaintiff correctly notes, 5 *Williston on Contracts* § 688 (3d ed.), cited by defendant in support of this proposition, pertains to loss of an excuse for nonperformance, and has no relevance to the situation here present. See *Restatement of Contracts*, § 410; 5 A *Corbin on Contracts* § 1244.

In sum, plaintiff protested the Contracting Officer's initial ruling, without success. After denial of that protest, it proceeded, as it was entitled (indeed, as plaintiff reasonably concluded, required) to proceed, by dealing with Sun States as best it could.

While defendant suggests that it relied to its detriment on plaintiff's failure to continue to protest, the record is very clear that throughout 1964 defendant was, or at the very least should have been, aware of Sun States' performance (or, more accurately, lack of performance), and of the fact that Sun States was on the job only over plaintiff's protest. If, in these premises, defendant failed to protect itself, the blame must ultimately lie at defendant's, and not plaintiff's, doorstep.

Defendant's speculations that the Contracting Officer might have either terminated the contract or made a full investigation (the latter something he should have done in any event) had plaintiff persisted even further than it did, or that defendant might have kept more detailed records of plaintiff's and Sun States' performance, furnish no basis for any different conclusion. Plaintiff's claim is in no way barred by the doctrines of waiver or estoppel.

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[8] Defendant's Brief, pp. 19–20.

II

Having concluded that plaintiff is entitled to recover from defendant its damages attributable to defendant's breach of contract, the difficult issues relating to the extent of such damages remain to be considered.

It is undisputed that plaintiff's "total costs" of performing the clearing and footings work were either $2,539,505 (utilizing AGC equipment costs in the computation) or $2,448,938 (utilizing booked equipment costs in the computation).[9] There, however, agreement ceases.

Plaintiff would remove from either of the above sums what it asserts are its clearing costs, utilizing for this purpose the sum of $210,000 for which Mr. Bonner, Sun States' subsubcontractor, actually performed the clearing work. To each of the resulting net figures, plaintiff would then add 3 percent, as "Unbilled Corporate Charges", and a profit factor of 5.37 percent. The resulting sums (*i.e.*, adjusted "total costs", with and without AGC equipment costs) are, respectively, $2,509,669 and $2,429,994.

From each of these two figures, plaintiff would then subtract either (1) its revenues from the footings portion of the contract work ($1,032,028) or (2) "Average Unit Bids, 2nd, 3rd, & 4th Bidders w/10.0% Profit Removed (Assumed Included)" ($1,230,920). Plaintiff has also proffered a number of other alternative calculations, reflecting a variety of assumptions. Plaintiff's several damage calculations in evidence vary, from a high of $1,609,314 (in its initial claim summary) to a low of $1,075,186, depending on the assumptions on which a particular calculation is based. All of the calculations have in common, however, the factual premises that plaintiff's "total costs" were reasonable, and that none of its excess costs in connection with the footings work were attributable to plaintiff.

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[9] See finding 19, n. 9. Plaintiff says that using AGC costs the total was actually $2,522,396, but this error in equipment costs (if it be one) does not work to plaintiff's advantage and is immaterial to the disposition of the case since the trial judge and we both use booked equipment costs in assessing damages. The record shows that the total figure of $2,448,938 utilizing booked equipment costs is not dependent on the AGC equipment costs but was in effect arrived at independently of those AGC costs. [footnote by the court]

Defendant objects generally to all of plaintiff's calculations of damages, vigorously contending that a "total cost" approach is improper, but adding that in any event plaintiff has erred (1) in utilizing AGC equipment costs, rather than available booked equipment costs, (2) in utilizing a "fictional" 3 percent unbilled corporate charges factor, (3) in utilizing plaintiff's own, unreasonably low, bid figures for footings work in calculating its damages, (4) in failing to average "all of the other items with the Government estimate * * *", (5) in adding a profit factor to plaintiff's costs, rather than deducting a profit factor from plaintiff's (or an averaged) bid figure for footings work, (6) in failing to recognize that plaintiff's costs were unreasonable, thus requiring "some 'jury verdict' reduction * * *" in the costs claimed, and (7) in failing to take into account "the average clearing item bid * * *" or, at the least, $435,000, Sun States' bid price to plaintiff for the clearing work, in removing the clearing work from the calculation.[10]

Plaintiff's theory of the claim "has never been favored by the court and has been tolerated only when no other mode was available and when the reliability of the supporting evidence was fully substantiated." *WRB Corp.* v. *United States*, 183 Ct. Cl. 409, 426 (1968). See also *Seger* v. *United States*, 199 Ct. Cl. 766, 786, 469 F. 2d 292, 304 (1972); *Law* v. *United States*, 195 Ct. Cl. 370, 381–87 (1971); *Boyajian* v. *United States*, 191 Ct. Cl. 233, 238–55, 423 F. 2d 1231, 1234–44 (1970). As defendant asserts, that theory may not properly be invoked here. Plaintiff's low bid aside, the record precludes a finding that all of plaintiff's costs were reasonable, or that "it was not responsible for the added expenses." *WRB Corp.* v. *United States*, *supra*.

It is equally clear, however, that plaintiff suffered substantial monetary damage in direct consequence of defendant's breach of contract. And, an examination of the record shows it to be sufficient to permit the ascertainment by way of "jury verdict", with a reasonable degree of accuracy, of the extent of such damages. *Law* v. *United States*, *supra*, 195 Ct. Cl. at 386–87; *Boyajian* v. *United States*, *supra*, 191 Ct. Cl. at 254, 423 F. 2d at 1244; *WRB Corp.* v. *United States*, *supra*, 183 Ct.

[10] Defendant's Objections to Plaintiff's Requested Findings of Fact.

Cl. at 425–27. In the circumstances, plaintiff's claim does not fail for lack of proof.

Implicit in any "jury verdict", however, is the necessity for resolution of the conflicting claims of the parties as to several factors to be weighed in reaching such a verdict: whether AGC or booked equipment costs are to be considered; the propriety of considering unbilled corporate charges (and a profit factor) *vel non;* and the appropriate method of viewing plaintiff's clearing costs herein.

Actual, booked, equipment costs being available, AGC equipment costs may not be considered in assessing plaintiff's damages. *Bennett* v. *United States*, 178 Ct. Cl. 61, 371 F. 2d 859 (1967); *L. L. Hall Constr. Co.* v. *United States*, 177 Ct. Cl. 870, 379 F. 2d 559 (1966).[10a] A reasonable overhead factor may be taken into account in the assessment process, however, and plaintiff has proven that the 3 percent factor plaintiff would apply to its "total costs" is within the zone of reasonableness. *Bennett* v. *United States*, *supra; Luria Bros. & Co.* v. *United States*, 177 Ct. Cl. 676, 369 F. 2d 701 (1966).

A profit factor, on the other hand, may not be taken into account in reaching a "jury verdict" herein. *Bennett* v. *United States*, *supra*, and cases there cited. Too, plaintiff's attempt to remove clearing work from its "total costs" by subtraction therefrom of Sun States' sub-subcontract price of $210,000, rather than its own contract price of $435,000, fails. The record shows that the sub-subcontractor did the clearing work without difficulty or delay, and fails to show that plaintiff's cost for that work should be equated with Sun States', rather than its own.

[10a] In the absence of a regulation or directive such as in *Nolan Brothers, Inc.* v. *United States*, 194 Ct. Cl. 1, 437 F. 2d 1371 (1971), the burden is on the party seeking to substitute AGC costs for the contractor's own actual, booked costs to demonstrate that the contractor's own costs (as shown) are inadequate or incomplete or do not fairly represent the full costs rightly attributable to the particular contract. In this case, plaintiff did not succeed in bearing that burden; its effort to invoke AGC costs consisted mainly of general testimony as to the normal practice of building contractors, not criticism directed specifically to the $2,448,938 of costs calculated from its own actual, booked equipment costs in this particular instance. The plaintiff has simply failed to prove that in this case actual, booked costs are inadequate or incomplete or do not represent the full costs rightly attributable to the contract. [footnote by the court]

Upon the basis of a careful weighing of the record as a whole, including plaintiff's actual costs of performing the clearing and footings work; the factors enumerated in the preceding two paragraphs, as there indicated; defendant's estimate of the cost of the clearing and footings work, and all bids on that work opened May 12, 1964; the differences between the said bids (in terms of bid items) and the as-built footings work; and the fact that a definite, if not precisely measurable, part of plaintiff's costs in performing the footings work cannot fairly be charged to defendant in any event, it is found by way of "jury verdict" that plaintiff was damaged by defendant's breach of contract in the amount of $600,000. *Cf. Teitelbaum* v. *United States*, 198 Ct. Cl. 150, 165, 458 F. 2d 72, 81 (1972); *WRB Corp.* v. *United States*, *supra*, 183 Ct. Cl. at 425.

FINDINGS OF FACT

1. Plaintiff at all times here relevant was, and is, a corporation organized and existing under the laws of the State of California.

2. In early 1964, defendant, acting through the Bureau of Reclamation, Department of the Interior, issued an invitation for bids ("IFB") for the construction and completion of "the Flagstaff-Pinnacle Peak 345-KV Transmission Line No. 2, Transmission Division, Arizona, Colorado River Storage Project", in accordance with (*inter alia*) Specifications No. DC–6090. The said IFB provided that bids thereon would be opened in Phoenix, Arizona, May 12, 1964.

3. (a) The proposed transmission line was described in the IFB as a 345-kilovolt, 3-phase, 60-cycle, single-circuit transmission line, to be located in Coconino, Yavapai and Maricopa Counties, Arizona. The IFB indicated that the work was to be divided into two schedules, each 57 miles in length, with Schedule No. 1 extending from a tower at Station 0+00 (located about 1.5 miles southeast of Winona, Arizona) to Station 3028+20, and Schedule No. 2 extending from Station 3028+20 to the Bureau of Reclamation's Pinnacle Peak Substation (about 14 miles north of Scottsdale, Arizona).

(b) The IFB provided that the work to be performed in the construction of the proposed transmission line would consist of furnishing and installing gates in right-of-way fences; furnishing and installing cattle guards and culverts; clearing land and right-of-way; furnishing and installing tower leg grounds; constructing tower footings; testing, furnishing, and erecting steel towers; furnishing and attaching tower signs; furnishing and installing fence grounds; furnishing and stringing conductors and overhead ground wires complete with all accessories; and installing one 345-kilovolt transmission line approach span. It also provided that work should begin within 30 calendar days after the contractor's receipt of notice to proceed and be completed within 630 calendar days from the date of receipt of such notice.[1]

(c) Included in the IFB was Special Condition 24, Specifications No. DC–6090, "Listings of Subcontractors", providing in pertinent part as follows:

* * * * *

b. The bidder shall submit with his bid the firm name and address of each subcontractor to whom a subcontract will be awarded for each category of work listed in the "Supplement to Bid Form, S.F. 21—List of Subcontractors" attached to S.F. 21. Except as otherwise provided herein, the bidder agrees, if awarded the contract, not to contract to have any of the listed categories of work performed by any subcontractor other than the subcontractor named for the performance of such work.

c. * * * With respect to a project in Category B herein, and if no entries appear in the "Categories of Work" column in the Supplement to Bid Form, S.F. 21, the contractor shall insert the categories of work he proposes to subcontract and the name and address of each proposed subcontractor. In case of * * * Category B, if no subcontract is to be awarded for any category of work listed, the bidder will be required to insert his name and address opposite each such category and to perform such work with his forces and all such personnel shall be carried on his own payroll.

d. In the event the bidder fails in his bid (1) to identify the subcontractors as required by Subparagraph *b.*, or (2) to comply with Subparagraph *c.* if the

[1] The IFB also included, *inter alia*, provisions respecting "Liquidated Damages", "Construction Program", "Equipment Allowances for Contract Adjustments", and "Staking Out Work".

bidder himself intends to perform one or more listed categories of work, the bid will be rejected as nonresponsive to the invitation.

e. No substitution for any named subcontractor will be permitted prior to award, and only in unusual situations after award and then only upon the contractor's submission, in writing, to the Contracting Officer of a complete justification therefor and after obtaining the Contracting Officer's written approval thereof. This provision applies also to those categories for which the bidder lists himself.

* * * * *

CATEGORY B PROJECTS

Dams	Docks and Piers
Canals	Airport Runways
Transmission Lines	Fishways
Switchyards	Pumping Plants
Roads	Power Plants
Railroads	Substations
Sewer and Water Systems	Saline Water Conversion Plants
	Sewage Treatment Systems
Clearing Contracts	Water Treatment Plants
Bridges	Wells

4. (a) In a December 6, 1963 news release, the Secretary of the Interior stated that the requirement for bidder listing of subcontractors in bids on Interior Department construction work was being instituted "on a limited trial basis", in an "experiment" confined to contracting in New Mexico, Arizona, and such parts of the Navajo Indian Reservation as might extend into Utah and Colorado, in response "to growing industrial concern over the practice of bid peddling in the construction trades." The said news release also stated that GSA had been prompted by that same factor to initiate a similar requirement in contracts for the construction of public buildings, and that the "broader GSA experiment" would be closely watched and evaluated.

(b) Bid peddling, or bid shopping, describes a situation where, after bid opening and award, a successful government prime contract bidder who has utilized a particular potential subcontractor's bid figures in submitting a prime contract bid "shops" the subcontract work to other potential subcontractors in an effort either to obtain from a different subcontractor a lower price for the work to be subcontracted,

or to drive down that of the subcontractor whose figures were used in computing the prime bid.

5. (a) Prior to bidding on the Flagstaff-Pinnacle Peak Transmission Line, plaintiff had been, in essence, an electrical subcontractor. To that time, it had never built a power transmission line. In May 1964, its Transmission Line Department was staffed solely by S. M. Rivers, a former employee of Paul Hardeman, Inc., who had been employed by plaintiff April 27, 1964. Plaintiff did, however, then have a Power and Special Projects Section, and a nucleus from which a capacity to do footings work could have been built up.

(b) Mr. Rivers did not have actual authority from plaintiff to enter into or amend a contract. His payroll position was that of "Estimator," although he did not know that in 1964. A letter of May 12, 1964, from plaintiff to defendant, advising that plaintiff's bid had been predicated on being awarded all or none of the work, was signed by Mr. Rivers as "Manager, Transmission Line Department", and plaintiff's organization chart, submitted by it to defendant shortly after bid opening, also described him as occupying that position. The organization chart also reflected that if plaintiff obtained the transmission line contract, Mr. Rivers would be directly responsible for "its management and construction." Prior to contract award, however, defendant was advised that another MevA employee would serve as project manger.

(c) Plaintiff's bid on the Flagstaff-Pinnacle Peak Transmission Line was prepared by Mr. Rivers. He had no help in doing so. He had not to that time, and has not thereafter, estimated a project of such magnitude by himself.

6. (a) On a parallel transmission line in Arizona built prior to and during 1964 by another contractor, footings work had been performed by members of a union of operating engineers. Plaintiff had a contract with the International Brotherhood of Electrical Workers (IBEW), however, and while the national office of the IBEW did not assert jurisdiction over "underground work" in 1964, the Arizona IBEW Local did then claim the right to do such work. To avoid potential arguments with the Arizona IBEW Local over whether plaintiff had a right to perform the footings work itself, using operating engineers (at lesser cost than would

be involved were IBEW personnel to be used), Mr. Rivers, assuming that a subcontractor would be free to employ operating engineers, decided to try to subcontract the clearing and footings work covered by the IFB, and thereafter endeavored to obtain bids on that portion of the work. Prior to May 12, 1964, however, Mr. Rivers became aware that the IBEW Local was claiming the right to perform all of the work required on the proposed transmission line in any event.

(b) Despite his intent to subcontract the clearing and footings work, Mr. Rivers proceeded on his own to prepare a prime contract bid for plaintiff, utilizing his previous experience and knowledge of the job. In doing so, he reached in a few instances what he called "shotgun" numbers on items of footings work, *i.e.*, figures with little or no real basis. In determining a bid figure for clearing, Mr. Rivers engaged in "front-loading", *i.e.*, he "put early money in." The record does not reveal the exact source, in terms of work items, for the "early money."

(c) Plaintiff received a bid from the Foundation and Structure Corporation, in the amount of $1,263,720, on a portion of the footings work for the Flagstaff-Pinnacle Peak Transmission Line project. One "special condition" of the proposal was that no provision was made "to work under the agreement of the United Brotherhood of Electrical Workers", and that "If this is necessary, a complete reappraisal of labor costs would be required." On the assumption that IBEW personnel would be used to do the work, the bid was increased to $1,648,340.

(d) Mr. Rivers also solicited a bid on clearing and footings work from Hal Perry, a Phoenix contractor doing business as Sun States Contracting Company, from whom Mr. Rivers had received bids while with Paul Hardeman, Inc. Mr. Rivers did not discuss with Mr. Perry whether Sun States' bid should be based on use of IBEW or operating engineer personnel. Mr. Rivers testified that that "was his area, and he knew what was the approach * * *." Mr. Perry was aware, prior to May 12, 1964, that the IBEW Local was claiming the right to do all of the labor on the proposed transmission line.

(e) While with Paul Hardeman, Inc., Mr. Rivers had checked Mr. Perry's "credit", and had found it to be "slow but good." He did not then have access to Mr. Perry's bank balance, however. He did not make any further investigation into Mr. Perry's (or Sun States') financial situation prior to May 12, 1964.

(f) Mr. Rivers did not receive Sun States' bid on clearing and footings work until the evening of May 11, 1964. Bid opening was scheduled for May 12, 1964. Sun States' bid to plaintiff for clearing and footings work totaled $1,522,843. Although Sun States', bid figures on items of footings work, applied to estimated contract quantities, were in some instances higher (and in some lower) than the bid figures Mr. Rivers had determined for the same work, Mr. Rivers did not use Sun States' bid figures. Instead, plaintiff's prime contract bid contained the bid figures Mr. Rivers himself had reached for clearing and footings work (finding 6(b)). Plaintiff's bid to defendant on the clearing and footings work was some $350,000 more than Sun States' total bid to plaintiff, but plaintiff's bid to defendant on the footings portion of the work alone was some $145,000 less than Sun States' bid to plaintiff on that portion of the work.

(g) In bidding on the Flagstaff-Pinnacle Peak Transmission Line, Mr. Rivers, for plaintiff, listed Sun States (as "Sun States Construction Company") as a subcontractor for both clearing and footings work pursuant to Special Condition 24, Specifications No. DC–6090 (finding 3(c)). Mr. Rivers and Mr. Perry subsequently agreed orally that, should a subcontract be awarded to Sun States, it would be at the unit prices set forth in Sun States' bid, with the exception of overruns of estimated quantities, for which plaintiff would pay Sun States at plaintiff's prime contract bid prices. This agreement was made in consequence of Mr. Rivers' realization that paying Sun States' unit prices on footings work items would cost plaintiff quite a bit of money even without overruns.[2]

[2] The clearing work was on a lump-sum basis, while the footings work involved unit prices and estimated quantities. Sun States' bid on the clearing work was at a considerably lower price than plaintiff's, but as to the footings work the reverse was true.

7. At bid opening May 12, 1964, plaintiff's bid (of $6,148,581) was within about $115,000 of defendant's engineer's estimate, but was some $850,000 less than that of the next lowest bidder, a construction company which had just completed a parallel transmission line along the same right-of-way.

8. (a) Following May 12, 1964, plaintiff began to investigate Sun States' financial situation. After a fruitless request to Mr. Perry for information about financial resources, plaintiff received, on May 20, 1964, a Dun and Bradstreet report showing Mr. Perry's net worth to be about $43,000, and indicating Mr. Perry's declination to furnish any information about "individual contracting and logging activities at Stafford."

(b) On May 25, 1964, plaintiff forwarded to Sun States a copy of a "standard AGC subcontract agreement." *Inter alia*, the said agreement provided for a subcontract bond.

(c) On June 5, 1964, plaintiff was awarded a contract for the "construction of Flagstaff-Pinnacle Peak 345-kilovolt Transmission Line No. 2 * * *" at an estimated price of $6,132,587. Payment for work performed was to be made on a unit price or a lump-sum basis, as specified in contract schedules.

(d) Between May 12 and early June 1964, representatives of Sun States made to representatives of defendant in Phoenix a number of allegations respecting plaintiff. *Inter alia*, defendant was told that plaintiff was "bid shopping", that Mr. Perry had worked closely with Mr. Rivers in preparing plaintiff's bid, that Sun States had prepared the clearing and footings portion of plaintiff's bid, and that plaintiff was looking for a new subcontractor and trying to "dump" Sun States.

(e) At a meeting in Phoenix on June 9, 1964, between representatives of plaintiff and Mr. Perry (and two of his associates whose exact connection with Sun States is less than clear), plaintiff obtained some financial information with respect to Mr. Perry, Sun States, and the two associates, and was told Mr. Perry had secured a line of credit at a Phoenix bank. On investigation at the bank, however, plaintiff was told there was no such line of credit.

(f) On June 9, 1964, two of plaintiff's representatives visited the Bureau of Reclamation's Phoenix office, inquiring about the possibility of either substituting another subcontractor for Sun States (whose financial condition was then mentioned), or of plaintiff's doing the clearing and footings work itself.

(g) The Office of the Chief Engineer of the Bureau of Reclamation ("the Contracting Officer"), in Denver, Colorado, was promptly advised of the substance of both Sun States' assertions about plaintiff (finding 8(d)) and plaintiff's representatives' comments and questions. (Finding 8(f)).

(h) There is no credible evidence in the record that plaintiff ever engaged in "bid shopping" in connection with the contract in suit.

9. (a) On June 12, 1964, plaintiff addressed a letter to the Contracting Officer reading as follows:

> The MevA Corporation, persuant [sic] to Specification Section 24e, request permission to withdraw the name of the sub-contractor which we listed in our Bid Documents submitted May 12, 1964. The name listed was the Sun States Contracting Company, 1401 East Camelback Road, Phoenix, Arizona.
>
> Our detailed examination of the financial resources of this Corporation reveals that, in our opinion, they are inadequate to support performance of this sub-contract. We have examined the Corporation's financial statement and the personal financial statements of the Officers, have discussed this matter with the Sun States banking affiliate—The Valley National Bank, Mr. Norman J. Miles, Assistant Vice President, and have also obtained Dun and Bradstreet Reports. We believe that the satisfactory performance of this work covered by this subcontract would be seriously affected by this lack of financial stability.
>
> If approval is obtained for this withdrawal, we intend to provide a sub-contractor or contractors of definite financial responsibility or will provide performance by our own organization.

(b) By letter from defendant dated June 15, 1964, plaintiff received written confirmation of a telephonic postponement of a preconstruction conference scheduled for June 17, 1964. The said letter stated in part that the conference would

be rescheduled when plaintiff's request to withdraw Sun States had been resolved.

(c) On June 16, 1964, plaintiff's representatives met with representatives of Sun States in Phoenix. Mr. H. C. Tognoni, an attorney whom Sun States had retained that day, was present at the meeting.[3] Precisely what occurred is in some dispute. See finding 15. While Mr. Tognoni testified in 1967 at a hearing before an Interior Department Board of Contract Appeals that he told plaintiff the purpose of the meeting as he understood it was to reduce an oral contract between plaintiff and Sun States to writing, and that his clients understood plaintiff was to furnish financing and would not require a bond from Sun States, the preponderance of the credible evidence is that plaintiff was never told by any representatives of Sun States (or by anyone else), prior to the 1967 administrative hearing, that either Mr. Rivers or plaintiff had assertedly made any prebid promises to Sun States with respect to financing or bonding.

(d) On June 17, 1964, Mr. Tognoni met with a representative of defendant in Phoenix, asserting that Sun States had a pre-bid understanding with plaintiff that plaintiff would finance the subcontract work and "bond Mr. Perry", and that there had been no change in circumstances since bid opening.

(e) By letter dated June 17, 1964, the Contracting Officer advised plaintiff in pertinent part as follows:

> It appears that there has been no change in the circumstances existing at time of submittal of your bid to justify substitution of subcontractors as requested. Accordingly, approval of any substitution is denied.

(f) At the time the said letter of June 17, 1964, was written, the Contracting Officer was aware of Sun States' allegations about plaintiff (findings 8(d), 9(d)) and he had concluded, particularly in light of plaintiff's June 12, 1964 request (finding 9(a)), that plaintiff might be bid shopping. Defendant's representatives made no effort, at any time during the period 1964–66, however, to ascertain whether or not

[3] Mr. Tognoni represented Sun States to about mid-July 1964. At about that same time, Mr. Perry's two associates (finding 8(e)) also dropped out of the picture, so far as the record shows.

Sun States' allegations with respect to plaintiff had any foundation in fact.

10. (a) On June 22, 1964, Mr. Tognoni met with personnel of the Bureau of Reclamation in Washington, D.C.

(b) The Contracting Officer was informed by telephone prior to June 24, 1964, of Mr. Tognoni's meeting with Bureau personnel. A speedletter, dated June 23, 1964, from the Assistant Commissioner of the Bureau to the Contracting Officer (received in Denver on June 24, 1964), reflects that Mr. Tognoni had indicated that "while there were alleged to be several reasons for Meva to not retain the subcontractor, the only concrete reason that he could ascertain was lack of finances", and that "He [Mr. Tognoni] was in the process of arranging for finances and * * * that Sun States should have this available early this week * * *." At the 1967 administrative hearing, Mr. Tognoni agreed that the said speedletter reflected the substance of his conversation with Bureau personnel.

11. (a) Sometime between June 17 and June 24, 1964, representatives of plaintiff requested a conference with the Contracting Officer. Such a conference was held in the Contracting Officer's office in Denver June 24, 1964.

(b) At the conference, plaintiff told defendant that Sun States could not make bond and had no financing, and that plaintiff wanted either to obtain a subcontractor with adequate financing to perform the clearing and footings work, or perhaps to do that work with its own resources. Plaintiff also told defendant that Sun States' bid had been received just prior to bid opening, and that plaintiff had therefore not been able to make any pre-bid appraisal of Sun States' capabilities. While defendant advised plaintiff that Sun States had been in touch with the defendant in opposition to any possible substitution by plaintiff of another subcontractor (or plaintiff itself) for Sun States, defendant did not tell plaintiff of Sun States' charges that plaintiff was bid shopping, nor were any promises plaintiff had supposedly made to Sun States about financing and bond mentioned. Plaintiff requested a decision under Special Condition 24, and was told by the Contracting Officer that absent a showing of some change in Sun States' circumstances fol-

lowing May 12, 1964, any substitution for Sun States was in his view unjustifiable. In consequence of this advice, plaintiff did not furnish to defendant documents containing financial information on Sun States (including Mr. Perry and others) it then had, and which had been mentioned in its letter of June 12, 1964, to the Contracting Officer. At trial in 1972, the Contracting Officer candidly admitted that even had plaintiff given him clear proof of Sun States' insolvency in June 1964, he would nonetheless have denied plaintiff's request to substitute, had Sun States been equally insolvent on May 12, 1964, since, in his view, in 1964 and thereafter, the requirement of a post-bid change in circumstances was implicit in Special Condition 24.

(c) There is testimony in the record that plaintiff was told at the June 24, 1964 conference that the Regional Solicitor would obtain from the Bureau's Washington office an opinion whether Special Condition 24 prohibited plaintiff from doing the clearing and footings work itself. The Contracting Officer's diary for June 24, 1964, reflects, however, that prior to the meeting with plaintiff on that day a Bureau attorney in Washington (not in the office of the Solicitor, Department of the Interior) "had stated that a prime doing the work themselves in lieu of a listed sub was a substitution and could not be permitted * * *." The Contracting Officer's diary entry respecting the June 24, 1964 meeting with plaintiff also reflects advice by plaintiff that Sun States "proposed to sub the work themselves to other subs in its entirety", that the Regional Solicitor expressed doubt about the propriety of *this* course "but said he would check with Washington and they should call him the next day", and that the Regional Solicitor advised plaintiff that "doing the work themselves would be considered a substitution." The contemporaneous entries are here credited.

(d) There is conflicting evidence whether or not plaintiff was told on June 24, 1964, that, if plaintiff persisted in a demand for substitution, Sun States would have to be given a chance to be heard. Plaintiff's witnesses flatly denied that any such statement was made, while government witnesses of equal credibility testified to the contrary. It is found that the government witnesses were mistaken. The Contracting

Officer's diary for June 26, 1964, reflects that during a conversation with Mr. Tognoni on that date, "I told him we had told Meva that if they wanted a substitution considered it would be necessary they present it formally and that we would give Sun States an opportunity to answer the charges." The weight of the credible evidence is that the Contracting Officer told Mr. Tognoni on June 26 that Sun States would be heard if plaintiff persisted, but that he did not so inform plaintiff on June 24, 1964.

12. (a) Following June 24, 1964, plaintiff, faced with the Contracting Officer's denial on June 17, 1964, of "approval of any substitution" on the ground of lack of any change in circumstances existing on May 12, 1964, and the Contracting Officer's June 24. 1964 affirmation that absent a showing of such a change in circumstances there could be no substitution of another subcontractor (or plaintiff) for Sun States, entered into extensive negotiations with Sun States with a view to reaching a subcontract with Sun States.

(b) By letter dated July 9, 1964, to the Contracting Officer, plaintiff advised the Contracting Officer that it had met with Sun States on several occasions, was hopeful that a subcontract would soon be consummated, and that every effort was being made to reach a mutually acceptable subcontract with Sun States, but that, should subcontract negotiations fail, "it is likely that a request will be made for a reconsideration of our request to substitute the proposed subcontractor, or that the work be performed by ourselves." Plaintiff's said letter further stated that:

> When we previously met with you, a question was raised as to whether or not it would be necessary to obtain the consent of the Bureau of Reclamation in the event the prime contractor desired to perform the work instead of the proposed subcontractor. It would be appreciated if your office will advise us of its interpretation of the language contained in the contractual documents relating to "substitution of subcontractors" as it pertains to work performed by the prime contractor. One interpretation that possibly could be made is that it would not be necessary to obtain the consent of the Bureau of Reclamation when a prime contractor decides to perform work previously shown on the contract documents as work to be performed by a listed subcontractor.

This interpretation would be based on the theory that when the work is performed by the prime contractor, there is no "substitution of subcontractors."

(c) On July 15, 1964, plaintiff entered into a subcontract with Sun States. In a formal written contract between the two dated July 20, 1964, Sun States agreed (*inter alia*) to use IBEW labor and plaintiff agreed (*inter alia*) that Sun States needed not furnish plaintiff a bond.

(d) By letter dated July 17, 1964, to plaintiff, received by plaintiff July 20, 1964, the Contracting Officer notified plaintiff to proceed with the work covered by the contract plaintiff had been awarded June 5, 1964. Plaintiff, in turn, gave Sun States notice to proceed on its subcontract with plaintiff by telegram dated July 20, 1964. While there is evidence that the Bureau had some difficulty in obtaining rights-of-way on two parcels of land at the southern end of the proposed transmission line project, the northern end was, in the summer of 1964, the critical work area, because of weather, and it is reasonable to conclude from the record that plaintiff's request for permission to substitute for Sun States, which led to cancellation of the preconstruction conference scheduled for June 17, 1964, and plaintiff's failure to reach agreement with Sun States until July 15, 1964, affected the timing of the issuance to plaintiff of the notice to proceed. The end of the fiscal year was, however, a busy period, followed by a holiday, and those factors too may have contributed to the timing of the issuance of the notice to proceed.

(e) On July 22, 1964, a preconstruction conference was held in Phoenix, Arizona. Representatives of plaintiff, Sun States, and defendant were in attendance. Plaintiff's proposed construction program was tentatively approved. Plaintiff advised defendant that plaintiff would provide close surveillance to the work.

(f) By letter, dated July 28, 1964, in response to plaintiff's letter of July 9, 1964, the Contracting Officer advised plaintiff that, in his view, Special Condition 24 precluded plaintiff "as prime contractor from performing any work shown in the contract as work to be performed by a listed

subcontractor unless written permission is obtained from the contracting officer," and that:

> If it should be your final decision not to proceed to enter into a subcontract with your listed subcontractor and, as a result, you choose, as an alternate, to request my approval for substitution of yourself as prime contractor for work previously listed for performance by that subcontractor, I will be glad to give you a formal and final decision on the matter upon request being made therefor.

The said letter contains no suggestion that the Contracting Officer had changed his mind as to the necessity for a postbid change in circumstances, but, in any event, by the time it was written plaintiff had already entered into a contract with Sun States, and Sun States had attended the July 22, 1964, preconstruction conference.

13. (a) The geographic location in which the proposed transmission line was to be built is at such altitudes, and in such terrain, that winter work on the northern half of the project (called Schedule No. 1), in northern Arizona, was virtually impossible. The southern half of the project (called Schedule No. 2) is at lower altitudes where work can be performed throughout the year, although excessive heat in the summer might hamper the conduct of construction operations.

(b) Plaintiff's work plan and schedule, as originally submitted to defendant, was to start clearing and footings work on the northern end of the project beginning June 15, 1964, and to proceed toward the southern end of the project without interruption, completing these portions of the work in about a year. The July 17, 1964 issuance of notice to proceed obviously precluded effectuation of plaintiff's original timing of the start of work.

(c) Sun States was obligated by its subcontract with plaintiff to maintain a production schedule of an average of not less than 10 miles of acceptable footings per month. Clearing work at the north end of Schedule No. 1 was to begin first. Clearing work, sub-subcontracted by Sun States to Mr. B. B. Bonner at a price of $210,000, began July 28, 1964, and was completed without any apparent difficulty or delay. Sun States was obligated to commence footings excavation at the north end of Schedule No. 1 within 14 days after clearing

work started, or by August 11, 1964. The subcontract also provided that the 10-mile a month production schedule should "begin at same time as start of footing excavation." In fact, Sun States did not begin footings excavation until August 27, 1964. While plaintiff had originally planned to start work at the north end of the project and to proceed to the southern end without interruption, Sun States' subcontract provided instead that it would "maintain the rates of production on Schedule No. 1 until it is mutually agreed that weather conditions prevent further practical progress", then to transfer operations to the south end of the project and work north, returning to work on Schedule No. 1 when weather again permitted.

14. (a) Shortly after Sun States began to perform the footings portion of the work, plaintiff (and defendant) became aware that Sun States was not making satisfactory progress on the job. Sun States never achieved the required production rate of 10 miles of footings per month, in fact completing no more than 10 miles of footings during the period August–December 1964. Throughout this period, plaintiff repeatedly complained to Sun States about the latter's operations. As early as October 22, 1964, plaintiff stated to Sun States that if the work did not proceed in an orderly manner, plaintiff would have to take "more drastic steps," and by letter dated November 2, 1964, plaintiff advised Sun States that absent an increase in production plaintiff's only alternative would "be to take over the operation and complete it ourselves." Throughout this same period, plaintiff's project manager and defendant's project engineer met frequently to discuss job progress.

(b) The record establishes that the basic reason for Sun States' failure to make the progress it had agreed to make was a lack of financial capability and resources (*i.e.*, that it did not have enough personnel, equipment, or material on the project) to do the footings work at the required rate of progress.

(c) At a November 12, 1964 meeting between representatives of plaintiff and Sun States, it was agreed that effective November 16, 1964, plaintiff's project manager would manage the Sun States operation at the north end of the project

for Sun States, with Mr. Perry to devote full time to the southern end of the project. Plaintiff also stated that it was instituting a quality control program and would assign an engineer to inspect each operation. Defendant was so advised.

(d) By agreement dated December 23, 1964, between plaintiff and Sun States, the subcontract between the two was terminated effective December 31, 1964. Plaintiff assumed and paid all obligations of Sun States for labor, materials, equipment and supplies incurred in Sun States' attempted performance of the footings work. Plaintiff also employed Mr. Perry as a safety engineer. Defendant was orally advised, sometime in January 1965, of the said termination agreement, and made no objection to either that agreement or plaintiff's intent to complete the footings work itself.

(e) While the record is not precise as to time, operations at the north end of the project continued for several, and perhaps as much as 7 or 8, weeks after plaintiff's project manager took over management of that portion of the work, when work on Schedule No. 1 was shut down. See finding 13(a). Except for some completed footings, much of the footings work done at the north end of the project prior to the shutdown promptly deteriorated and had to be redone in 1965, and was essentially useless in terms of advancing completion of the project.

(f) The subcontract between plaintiff and Sun States provided, *inter alia*, that time of performance was of the essence of the subcontract, and that Sun States would be responsible to plaintiff for all damages caused by its delay. Plaintiff also had the right, after giving 48 hours' written notice, to terminate Sun States' right to proceed with the work should Sun States (among other things) fail in any respect "to properly and diligently prosecute the work covered by this Agreement * * *." It is fair to conclude from the record as a whole that plaintiff had ample legal grounds upon which to terminate its subcontract with Sun States, either by agreement as it did effective December 31, 1964, or by the exercise of the powers above described, at least several weeks prior to December 31, 1964.

(g) During the period January–April 1965, progress on the work (at the south end of the job) fell well short of the

10 miles of footings per month originally scheduled. By about March 1, 1965, if not earlier, plaintiff had decided to acquire Power City Construction and Equipment, Inc., for the purpose (*inter alia*) of completing the footings portion of the contract work, and in or around that month it did so. Power City personnel began to work on the project late in April or early in May 1965, and during the period June-mid-October 1965 progressed the footings work at a rate of better than 10 miles per month.

(h) The record does not reflect any attempts by plaintiff, in or after December 1964, to subcontract the uncompleted portion of the footings work to another subcontractor.

(i) A definite, if not precisely measurable, part of plaintiff's costs in performing the footings work resulted from (a) efforts to work at the north end of the project, notwithstanding weather conditions, into early 1965; (b) plaintiff's hesitance in taking action to terminate Sun States' right to proceed, notwithstanding the latter's grossly inadequate performance in and after August 1964; (c) plaintiff's failure until after April 1965 to make satisfactory progress on the footings work; (d) adverse weather conditions in March and April 1965; and (e) plaintiff's problems in obtaining a sufficient supply of labor for footings work.

15. (a) By letter dated September 13, 1966, to the Contracting Officer, plaintiff made a claim for (*inter alia*) $1,114,364 as the "Direct increased cost of performance of subcontract items" in consequence of the Contracting Officer's denial of plaintiff's request either to substitute a new subcontractor for Sun States or to do the clearing and footings work itself. By decision dated May 2, 1967,[4] the Contracting Officer denied plaintiff's claim, stating, *inter alia*, that lack of financial responsibility of a listed subcontractor was insufficient to justify a substitution on grounds of an unusual situation, absent a showing of a significant change of circumstances from those understood by the contractor based on reasonable inquiry at the time of bidding. Plaintiff duly appealed the said decision pursuant to the Disputes Clause.

[4] A preliminary draft of the Contracting Officer's decision was prepared in the Phoenix office of the Bureau of Reclamation. A draft was then prepared in the Bureau's Denver office. The Contracting Officer then reviewed the draft.

(b) In November 1967, a hearing was held before the Department of Interior Board of Contract Appeals on plaintiff's appeal from the said decision of May 2, 1967. The administrative record resulting from that hearing contains some 560 pages of testimony, and a considerable number of documents received in evidence. Following that hearing, the Department of Interior Board of Contract Appeals concluded that it was "without jurisdiction over the claims asserted", that plaintiff could receive no relief under the terms of the contract, and that plaintiff's appeal was dismissed.

(c) At trial of this cause in Phoenix, Arizona, August 14–17, 1972, the transcript of testimony made during the administrative hearing and all exhibits there received in evidence, were received in evidence, by agreement of the parties, to be considered in making findings of fact herein as though presented in open court.

(d) In many respects, the record in this cause presents irreconcilable conflicts of testimony. In the course of pretrial, the trial judge "suggested [to the parties] that, in the event of any questions of credibility arising from the administrative record, opportunity to observe and evaluate the credibility of witnesses at trial would be a desirable opportunity."

(e) During the administrative hearing both plaintiff and defendant presented a number of witnesses. One witness for plaintiff whose administrative testimony raised some questions as to credibility (Mr. Trimbach) did not testify at trial. Two of defendant's witnesses during the administrative hearing whose prior testimony conflicted with plaintiff's evidence (Mr. Perry and Mr. Tognoni) did not testify at trial. Despite this lack of opportunity to observe certain important witnesses whose testimony is, by stipulation, nonetheless part of the record of trial, every effort has been made to resolve conflicts in the record in accordance with the preponderance of the credible evidence.

16. (a) In light of the Contracting Officer's June 12, 1964, denial of plaintiff's request to "withdraw" Sun States and either to furnish a subcontractor of definite financial responsibility or to do the work itself (finding 9(a)) on the ground that there had been no "change in circumstances existing at time of submittal of your bid * * *" (finding

9(e)), the Contracting Officer's June 24, 1964, oral reiteration to plaintiff that, absent a showing of a change in Sun States' circumstances following May 12, 1964, any substitution for Sun States was in his view unjustifiable (finding 11(b)), and the circumstances then facing plaintiff (findings 9(b), 12(a), 12(d), 13(a), 13(b)), the Contracting Officer's said decisions were reasonably construed by plaintiff as final decisions leaving plaintiff no choice but to proceed as it did by way of a subcontract, on terms as favorable to plaintiff as it could obtain, with Sun States. Plaintiff's July 9, 1964, letter to the Contracting Officer (finding 12(b)) is clearly not inconsistent with that reasonable construction. Rather, recognizing the Contracting Officer's position, plaintiff told him it would proceed as his decision required, reserving the right to come back to him should it be unable to do so.

(b) In light of the findings of fact herein above made, and the record as a whole, plaintiff's failure to advise the Contracting Officer that it was proceeding under protest, to appeal his decision, or to advise defendant at the time that increased costs might result from the Contracting Officer's action, furnish no basis for invoking estoppel against plaintiff "by [in defendant's words] acquiescence or otherwise," on the ground that "plaintiff prevented the Contracting Officer from having an opportunity to make a determination under Special Condition 24 on the basis of all the facts, including facts concerning prebid dealings", nor for any conclusion that plaintiff "waived any right it might otherwise have possessed to substitute itself or another subcontractor for Sun States before beginning work." [5]

17. (a) Plaintiff's bid for the clearing portion of the contract work was $920,000. Its bid for the footings portion of the contract work (utilizing plaintiff's unit bid prices, extended to as-built quantities for certain contract items)[6] was $1,030,015.

(b) Sun States' bid to plaintiff for the clearing portion of the contract work was $435,000. Sun States' bid to plaintiff

[5] Defendant's Requested Finding 34.
[6] See n. 9, *infra*.

for the footings portion of the contract work (utilizing Sun States' unit bid prices and estimated contract quantities) was $1,087,843. Thus, Sun States' total bid for clearing and footings work ($1,522,843) was less than plaintiff's bid to defendant on that portion of the contract work, when the two bids are compared utilizing estimated contract quantities. As noted in finding 6(f), however, Sun States' bid to plaintiff on the footings work alone was, on this same basis, about $145,000 higher than plaintiff's bid to defendant.

(c) The clearing portion of the contract work was sub-subcontracted by Sun States to Mr. B. B. Bonner at a cost of $210,000, and was satisfactorily performed by Mr. Bonner without difficulty or delay.

18. The abstract of bids on the proposed transmission line reflects a government engineer's estimate of the cost of the work, and that seven bids were opened May 12, 1964. In relevant part, the information in the abstract of bids can be summarized as follows:

Source of Figures	*Total Bid*[7] *(estimated cost)*	*Clearing Work*	*Footings Work*[8]	*Total Clearing and Footings Work*
Engineer's Estimate	$6, 265, 058	$640, 000	$1, 049, 987	$1, 689, 987
Plaintiff	6, 148, 581	920, 000	944, 280	1, 864, 280
Bidder A	7, 001, 399	249, 500	1, 289, 799	1, 539, 299
Bidder B	7, 089, 657	832, 500	1, 088, 680	1, 921, 180
Bidder C	7, 163, 845	1, 114, 820	1, 261, 750	2, 376, 570
Bidder D	7, 802, 418	969, 000	1, 653, 299	2, 622, 299
Bidder E	7, 899, 621	466, 720	1, 545, 857	2, 012, 577
Bidder F	8, 909, 315	706, 830	2, 273, 323	2, 980, 153

19. Plaintiff's "total costs" of performing the clearing and footings work are agreed by the parties to be $2,539,505 (utilizing AGC equipment costs in the computation), or $2,448,938 (utilizing booked equipment costs in the computation).[9] Plaintiff would then subtract, from either of its al-

[7] Figures to the nearest dollar.

[8] Figures derived from Items 2–28, 63A, 63B, and 65–90. *Cf.* n. 9, *infra.*

[9] Plaintiff's as-built calculations exclude certain Items (5, 7, 9–12, 15, 20, 69, 71–74, 77, and 82) included in both Sun States' bid to plaintiff and the calculations appearing in finding 18, and include certain Items (29 and 91) not included in either Sun States' bid to plaintiff or the calculations appearing in finding 18. Defendant has not objected to plaintiff's as-built calculations as either improperly omitting or improperly including Items. Comparison of figures is, however, made somewhat more difficult by the absence of a common base for all calculations.

ternative starting points, clearing costs which it asserts should be removed from the claim, utilizing for purposes of this deduction the $210,000 figure for which Mr. Bonner, Sun States' sub-subcontractor, actually performed the clearing work. To each of the two net figures resulting from this deduction, plaintiff would add 3 percent, as "Unbilled Corporate Charges", and a profit factor of 5.37 percent. The resulting sums (*i.e.*, adjusted "total costs" with and without AGC equipment costs) are, respectively, $2,509,669 and $2,429,994. From each of these two figures, plaintiff would then substract either (1) its revenues from the footings portion of the contract work ($1,032,028) or (2) "Average Unit Bids, 2nd, 3rd, & 4th Bidders w/10.0% Profit Removed (Assumed Included)" ($1,230,920). A number of other alternative calculations, reflecting a variety of differing assumptions, are also in evidence. In general terms, plaintiff's calculations of its damages in consequence of defendant's asserted breach of contract vary from a high of $1,609,314 (on its initial claim summary) to a low of $1,075,186, depending on the assumptions on which a particular calculation is based. Basic to all of plaintiff's calculations, however, are (among other things) the factual premises that its "total costs" were reasonable, and that it was not responsible for any portion of its excess costs in connection with the footings work.

20. Beyond its contention of no liability to plaintiff at all, defendant objects generally to plaintiff's calculations of damages, urging that a "total cost" approach is improper, but that in any event plaintiff's claim is unsound (1) in its use of AGC, rather than booked, equipment costs, (2) in utilizing a "fictional" 3 percent unbilled corporate charges factor, (3) in utilizing plaintiff's own, unreasonably low, bid figures for footings work in calculating damages, (4) in failing to average "all of the other items with the Government estimate * * *", (5) in adding a profit factor to plaintiff's costs, rather than deducting a profit factor from plaintiff's (or an averaged) bid figure for footings work, (6) in failing to recognize that plaintiff's costs were unreasonable, thereby necessitating "some 'jury verdict' reduction * * *" in the costs claimed, and (7) in connection with the clearing work, in failing to take into account "the average clearing

item bid * * * " or, at the least, $435,000, the amount of Sun States' bid to plaintiff for clearing work.[10]

Ultimate Conclusions

21. In the facts and circumstances of this cause, the Contracting Officer's denials of plaintiff's requests to substitute either another, financially capable, subcontractor, or itself, for Sun States were arbitrary, capricious, and in breach of his contractual obligations to plaintiff. Plaintiff's claim to resulting damages is barred neither by estoppel nor waiver.

22. (a) While it is clear from the record as a whole that plaintiff suffered substantial monetary damage in direct consequence of the Contracting Officer's denials of plaintiff's requests for approval to substitute for Sun States, the record also precludes any finding that plaintiff's bid on the clearing and footings work (or on the footings work alone) was reasonable, that all of plaintiff's costs were reasonable, or that it was not responsible for any portion of such costs. See finding 14. On this record, therefore, (1) plaintiff's "total cost" approach is in appropriate, (2) the amount of such monetary damage cannot be measured with any precision, and (3) the amount of such damage can be arrived at only by way of a "jury verdict" from the evidence as a whole. See *WRB Corp.* v. *United States*, 183 Ct. Cl. 409 (1968).

(b) Plaintiff has failed to establish that it is entitled to have AGC equipment costs, rather than its available booked equipment costs, taken into account in assessing its damages for breach of contract. *Bennett* v. *United States*, 178 Ct. Cl. 61, 371 F. 2d 859 (1967); *L. L. Hall Constr. Co.* v. *United States*, 177 Ct. Cl. 870, 379 F. 2d 559 (1966).

(c) Plaintiff is entitled to have a reasonable overhead factor taken into account in assessing its damages for breach of contract, and the record establishes that the 3 percent factor it would apply to its "total costs" is within the zone of reasonableness. *Bennett* v. *United States*, *supra*; *Luria Bros. & Co.* v. *United States*, 177 Ct. Cl. 676, 369 F. 2d 701 (1966).

(d) Plaintiff is not entitled to have a profit factor taken into account in assessing its damages for breach of contract. *Bennett* v. *United States*, *supra*, and cases there cited.

[10] Defendant's Objections to Plaintiff's Requested Findings of Fact.

(e) The record does not establish the propriety of plaintiff's attempt to remove clearing work from its "total costs" by deletion therefrom of Sun States' sub-subcontract price of $210,000. That work having been performed without difficulty or delay, plaintiff has not established that its cost for this work was only $210,000, and not $435,000, the amount of Sun States' bid to plaintiff on the clearing work. On this record, defendant is entitled to have the latter figure, and not the former, taken into account in assessing plaintiff's damages for breach of contract.

23. Based upon the record as a whole, including plaintiff's actual costs of performing the clearing and footings operation; the factors enumerated in finding 22 as there indicated; defendant's estimate, and each of the bids, listed in finding 18; the differences between the said bids (in terms of bid items) and the as-built footings work; and that, as finding 14 reflects, a definite, if not precisely measurable, portion of plaintiff's costs in performing the footings work cannot fairly be charged to defendant in any event, it is found by way of a "jury verdict" that plaintiff was damaged by defendant's breach of contract in the amount of $600,000.

CONCLUSION OF LAW

Upon the foregoing findings of fact and ultimate conclusions, which are adopted by the court and made a part of the judgment herein, the court concludes as a matter of law that plaintiff is entitled to recover the amount of $600,000, and judgment is entered to that effect.

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512 F. 2d 1082

EVERETT PLYWOOD CORPORATION v. THE UNITED STATES

[No. 743–71. Decided February 19, 1975]

ON THE PROOFS

Contracts; breach; timber cutting and sale contract; undelivered goods; damages; splitting cause of action; trade custom and practice.—In 1955 plaintiff contracted with the Forest Service of the Department of Agriculture to cut and purchase timber, the

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original term to expire December 31, 1960. When plaintiff commenced logging, excessive defects in the timber were discovered, resulting in a substantial underrun. It was this underrun that was the basis of the decision in *Everett Plywood Corp.* v. *United States*, 190 Ct. Cl. 80, 419 F. 2d 425 (1969), (Tonga I), affirming per curiam the trial judge's opinion and holding plaintiff entitled to recover the damages it suffered by reason of defendant's breach of a warranty of quantity. During pendency of that suit plaintiff was granted successive extensions of the contract and logging continued through the 1967 season. The Forest Service's policy governing extensions for all its timber cutting contracts was a very liberal one, unless there was a demonstrable disadvantage to the United States as set forth in its Handbook. In April 1968 the Service granted plaintiff's request for another season extension but warned it that only under extraordinary conditions would a further extension be granted. In January 1969 plaintiff requested an extension for the 1969 season and, while the Service granted a 1-month extension, on April 22, 1969, it finally refused any further extension. Meanwhile on March 20, 1969 the decision by the trial judge in Tonga I was handed down. Plaintiff's administrative appeal of the Service's denial of a further extension was dismissed in February 1971. The present case asserts breach of the same contract based on defendant's refusal to grant an extension thereof which would have allowed plaintiff to cut the remaining timber on the allotted area. Defendant contends that plaintiff has so split its cause of action that, by reason of the court's judgment in Tonga I, plaintiff is barred from any further relief, denies that there was a breach of contract, and denies that plaintiff is entitled to any recovery. It is *held* (1) that under the circumstances here where the present breach of contract claim arose several years after the claim of Tonga I and subsequent to the trial thereof, it would be an unwarranted extension of *Electric Boat Co.* v. *United States*, 81 Ct. Cl. 361 (1935), *cert. denied*, 297 U.S. 710 (1936), to hold that plaintiff's failure to seek to assert the present claims in Tonga I bars it from any further relief; the defense based on splitting of the cause of action is denied; (2) that defendant had an obligation to administer this contract and to evaluate plaintiff's requested extension in conformity with its own regulations and its well-established policy of granting extensions unless disadvantageous to defendant. The Service's unilateral imposition of the additional requirement of "extraordinary conditions" for obtaining an extension, having no apparent relation to its past administration of that policy, constituted a breach; (3) that, based on the computation of Tonga I which included the uncut timber as a part of the timber volume plaintiff would realize under the contract, plaintiff is entitled to recover for loss of road amortization; (4) that plaintiff is not entitled to recover on its claim to lost profits because it is based on the difference between the contract price and

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the price it would have received upon resale in the export market, and the evidence indicates that the principal part of plaintiff's timber purchases were for use in its own plywood operations and not for export of logs; (5) that, accordingly, plaintiff's claim for lost profits must be viewed as one for consequential damages, which would have been recoverable if defendant knew, or should have known, that plaintiff intended to resell a substantial number of the logs *and* that it sought to prevent its losses or mitigate its damages by procuring other timber, but neither condition has been satisfied; (6) that to the extent the contract price was below fair market value plaintiff is entitled to the benefit of its bargain as measured by that difference; however, the evidence indicates that plaintiff would have been obliged in 1969 to pay a contract price that was reasonably reflective of fair market value, and accordingly plaintiff suffered no compensable damages and is not entitled to recover on this phase of its claim; (7) (a) that as to its road repair claim, plaintiff is entitled to reimbursement for that portion which defendant was obligated to bear under the contract; and (b) as to its road maintenance claim, plaintiff had the obligation to maintain the roads both at the close of each season and at the termination of the contract; since the contract is silent that this obligation was dependent or contingent on plaintiff's cutting any specific volume of timber, defendant's breach was not of such a character as to relieve plaintiff of its obligation to perform road maintenance at the conclusion of the contract, and, accordingly, plaintiff has, through recovery on its road amortization claim, been fully compensated for all the damages it has been able to prove. Plaintiff is entitled to recover to the extent indicated, and judgment is entered for plaintiff for $34,570.83.

Pleading and practice; splitting causes of action; generally.

[1] One nondivisible contract normally gives rise to only one claim, not to a succession of individual-item claims with all the burdens they would bring and problems they would entail. Nonetheless, a separate action founded on a single nondivisible contract may be maintained if the later claim is severable from the earlier one, and, if at the time of commencement of the earlier suit, the later claim was not then capable of being asserted. However, if the claimant, before filing its first suit, is in possession of all the facts on which its second suit is based, the splitting of the claims into multiple suits is fatal to maintenance of the later-filed action.

United States ⇐ 74(7)

Pleading and practice; splitting causes of action; generally.

[2] A litigant is required to seek to amend a pending suit to add later accruing claims under a single contract if he is to avoid dismissal of a later suit on the ground he has split his cause of action. However, as to this court, the obligation to amend does not extend to claims

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accruing after a trial has been held and after the trial judge's decision has been rendered. While, in an appropriate case, it may be desirable even under those circumstances for a party to seek to amend, it does not follow that judicial economy, convenience and fairness to litigants will always be served by imposing such a requirement either on the parties or the court.

Courts ⇐ 463

Contracts; interpretation; trade usage or practice; generally.

[3] Where a well-established practice or custom is shown to exist, it is assumed that the parties to a contract intended that practice or custom to apply in the absence of express language in the contract to the contrary; and the rights and obligations of the parties under the contract are construed in light of such practice or custom.

Customs and Usages ⇐ 15(1)

Contracts; breach; extension of contract terms; refusal to grant.

[4] Where the well-established practice of the Forest Service was to set a fixed term for performance under contracts for cutting and sale of timber and to liberally grant extensions of the term unless there was a demonstrable disadvantage to the United States, and, although the warning that the Service would grant plaintiff another extension only under "extraordinary conditions" is not itself inconsistent with a determination by the Service that further extensions would be disadvantageous to the United States, it was a breach of contract when the Service refused plaintiff's request for an extension since the requirement of "extraordinary conditions" rather than disadvantage to the United States was the basis for the determination not to extend the contract, the extraordinary conditions standard being entirely different from that theretofore applied by the Service, both under the present contract and all other contracts.

Woods and Forests ⇐ 8

Regulations of Executive Department; administrative or executive discretion; abuse of discretion.

[5] A party vested with contractual discretion must exercise that discretion fairly and reasonably, not arbitrarily and capriciously. Where the Forest Service's Handbook provided that an extension of the term for performance under contracts for the cutting and sale of timber would be granted unless disadvantageous to the United States, such standard vests wide discretion in defendant in passing on requests for extensions. To impose, unilaterally, an additional condition on further extensions merely on the basis of speculation is neither fair nor reasonable and is contrary to defendant's obligation to plaintiff to administer the subject contract in an evenhanded manner consistent with the Service's well-established practices and published regulations.

Woods and Forests ⇐ 8

Syllabus

Contracts; damages; sale of goods; undelivered goods.

[6] The usual measure of damages for failure to deliver goods is the difference between the contract price the buyer was to pay and the fair market value of those goods.

Sales ⇐ 318(3)

Contracts; damages; sale of goods; undelivered goods; manufacturer v. exporter.

[7] While in a purchase for resale, it is appropriate to measure the buyer's damage upon nondelivery as the difference between the contract price and the price at which the goods were to be resold, in the present case where the record shows that the principal part of plaintiff's timber purchases were for the purpose of supplying its plywood operations and it was for that purpose it entered the contract, in that context the forseeable damages for which defendant is properly charged are the additional costs plaintiff incurred, or would have incurred, in procuring timber for its operations to replace the timber denied it by defendant's breach.

Woods and Forests ⇐ 8

Contracts; damages; sale of goods; undelivered goods; consequential damages.

[8] Where the principal part of plaintiff's timber purchases were for the purpose of supplying its own plywood operations, its claim for lost profits based on resale of the timber in the export-log market must be viewed as consequential damages which are recoverable only if defendant knew or should have known that plaintiff intended to resell a substantial number of the logs *and* if plaintiff sought to prevent its losses or mitigate its damages by procuring other timber.

Woods and Forests ⇐ 8

Contracts; damages; measure of damages; sale of goods; undelivered goods.

[9] Where it has been determined that defendant was in breach of the subject timber cutting and sale contract and that consequential damages are not recoverable, in the absence of evidence that plaintiff procured timber to replace the contracted timber, plaintiff is entitled to the benefit of its bargain only to the extent the contract price was below fair market value. On the basis of the evidence and in view of the redetermination provision of the contract, since plaintiff would have been obligated at the particular time involved to pay a contract price that was reasonably reflective of fair market value, it suffered no compensable damage by defendant's breach.

Woods and Forests ⇐ 8

James F. McAteer, for plaintiff. *Emmett G. Lenihan*, attorney of record. *William F. Lenihan*, of counsel.

Russell W. Koskinen, with whom was *Assistant Attorney General Carla A. Hills*, for defendant.

Before DAVIS, KASHIWA, and KUNZIG, *Judges*.

PER CURIAM: This case comes before the court on plaintiff's and defendant's exceptions, filed October 1, 1974, and October 30, 1974, respectively, to the recommended decision of Trial Judge Hal D. Cooper, filed July 12, 1974, pursuant to Rule 134(h). The court has considered the case on the briefs and oral argument of counsel. Since the court agrees with the recommended decision of the trial judge, with minor modifications by the court, it hereby adopts the same, as modified, as the basis for its judgment in this case as hereinafter set forth. Therefore, it is concluded that plaintiff is entitled to recover in accordance with the opinion and judgment is entered for plaintiff in the sum of $34,570.83.

Trial Judge Cooper's opinion, with minor modifications by the court, is as follows:

This action asserts a breach by the Forest Service of a contract for the sale of timber on Tonga Ridge. It is a sequel to the court's earlier decision in *Everett Plywood & Door Corp.* v. *United States*, 190 Ct. Cl. 80, 419 F. 2d 425 (1969), hereinafter referred to as Tonga I. In Tonga I, the court found a breach of warranty of quantity for which plaintiff was awarded damages. The present case asserts an additional breach of the same contract based on defendant's refusal to grant an extension thereof which would have allowed plaintiff to cut the remaining timber on Tonga Ridge. In addition, plaintiff seeks recovery of certain road repair and maintenance costs it incurred in the performance of the contract.

In defense, it is contended that plaintiff has so split its cause of action that, by reason of the court's judgment in Tonga I, plaintiff is barred from any further relief. Also defendant denies there was any breach of the contract and denies that plaintiff is entitled to any recovery whatsoever.

The facts regarding the contract were fully stated in Tonga I and will be restated here only to the extent necessary to an understanding of the parties' contentions. The original term of the contract, executed in 1955, extended to December 31, 1960. When plaintiff commenced logging, excessive defects in the timber were discovered, resulting in a substantial underrun. It was this underrun that was the basis for the

Tonga I case. During the pendency of that suit, filed in 1964, plaintiff was granted successive extensions of the contract and logging continued through the 1967 season. By that time, the only remaining timber was on Unit 15 of Tonga Ridge.

In requesting an extension of the contract for the 1968 season, plaintiff assigned as the reason therefor the difficulties presented by the short logging season at the high elevation at which Unit 15 was located and closed its request with the statement that "we should have no trouble completing the sale this coming season."

The Forest Service's policy governing extensions, both when the contract was entered in 1955 and when plaintiff's request for 1968 was made, was a very liberal one. The Forest Service Handbook stated it in the following terms:

> 2433.12—*Procedure.* Ordinarily, the timber sale contract is written on the basis that time is not of the essence. The termination date is fixed when the sample contract is drafted and thus becomes a condition of sale, * * * an extension of time may be granted by the officer approving the sale, his successor, or his superior, unless disadvantageous to the United States.

Extensions were regularly granted for a variety of reasons ranging from bad weather to poor economic conditions. Forest Service personnel testifying at trial could recall no specific instance where, prior to 1969, an extension had been denied and plaintiff had never been denied an extension on any of its other Forest Service contracts. The fact is that extensions of contracts were granted by the Forest Service with very little urging.

On April 8, 1968, the Forest Service granted plaintiff's request for an extension, but warned plaintiff that "only under extraordinary conditions will this sale be considered for another extension."

Plaintiff attempted but failed to complete logging on Unit 15 in the 1968 season. Although a number of excuses were given, it is doubtful, in view of the normally adverse conditions prevailing at high elevations, that any of the difficulties encountered by plaintiff were truly "extraordinary."

In November 1968, prior to any request by plaintiff, the Forest Service decided to grant no further extensions of the

contract. This decision was communicated to plaintiff on December 20, 1968. By letter of January 24, 1969, plaintiff formally requested an extension of the contract for the 1969 season. There then followed a series of events, summarized in finding 19, the net result of which was the grant of a one-month extension of the contract from March 31, 1969 to April 30, 1969, followed by a final refusal, on April 22, 1969, of any further extension. Meanwhile, on March 20, 1969, the trial judge's decision in Tonga I was handed down.

When its request for reconsideration of the Forest Service's decision was denied, plaintiff appealed to the Board of Forest Appeals which, ultimately, dismissed the appeal on the ground it had lost jurisdiction by reason of the subsequent resale of the timber on November 30, 1969, by the Forest Service. The Board's dismissal occurred on February 2, 1971, some 14 months after the court's per curiam affirmance of the trial judge's decision in Tonga I.

I. The Split Cause of Action Defense

On the foregoing facts, defendant contends that plaintiff has split its cause of action and is barred from any further relief.

In *Nager Electric Co.* v. *United States*, 177 Ct. Cl. 234, 368 F. 2d 847 (1966), the court, in considering the issue of statute of limitations, stated the controlling principle governing the rule against split causes of action:

> For reasons of judicial economy, convenience, and fairness to litigants, it is important to retain the principle that one non-divisible contract normally gives rise to only one claim, not to a succession of individual-item claims with all the burdens they would bring and problems they would entail. *Supra* at 254, 368 F. 2d at 861.

See, also, RESTATEMENT, JUDGMENTS § 62 (1942).

Nonetheless, a separate action founded on a single non-divisible contract may be maintained if the later claim is severable from the earlier one, and, if at the time of commencement of the earlier suit, the later claim was not then capable of being asserted. *United States* v. *Pan-American Petroleum Co.*, 55 F. 2d 753, 777 (9th Cir. 1932), *cert. denied*, 287 U.S. 612; *Fellows* v. *National Can Co.*, 13 F. 2d 210, 211

(E.D. Mich. 1926); RESTATEMENT, JUDGMENTS § 62, example (h.) (1942).[1] However, if the claimant, before filing its first suit, is in possession of all the facts on which its second suit is based, the splitting of the claims into multiple suits is fatal to maintenance of the later-filed action. *Container Transport International, Inc.* v. *United States*, 199 Ct. Cl. 713, 468 F. 2d 926 (1972).

In this case, essentially three claims are presented, the principal one being based on the Forest Service's refusal to grant an extension. A final decision on the request for an extension was not made until April 22, 1969, and the contract did not expire until April 30, 1969. Obviously, until the Forest Service had finally refused an extension, any claim based on a refusal to extend the contract would have been premature. Hence, it appears that it was not until April 22, 1969, at the earliest, that the extension claim accrued. The road repair claim arose in late 1968 and the road maintenance claim did not accrue until after the contract had expired.

Thus all of the claims now asserted arose some four or more years after the first suit had been filed and subsequent to the trial held in 1967 in Tonga I. Moreover, two of the three claims accrued after the opinion of the trial judge had been filed in the earlier case.

It is recognized that this court's holding in *Electric Boat Co.* v. *United States*, 81 Ct. Cl. 361 (1935), *cert. denied*, 297 U.S. 710 (1936), requires a litigant to seek to amend a pending suit to add later accruing claims under a single contract if he is to avoid dismissal of a later suit on the ground he has split his cause of action.[2] However, defendant has cited no authority, and none has been found, to support the proposi-

[1] The proposed revision of the RESTATEMENT takes the same position with respect to successive breaches of a contract. RESTATEMENT (SECOND) JUDGMENTS § 61.2, pp. 132–33 (Tent. Draft No. 1, 1973).

[2] *Electric Boat* was concerned with the effect of pursuing permissive administrative relief instead of seeking to amend to assert the claim in a pending suit. It is unclear from the evidence in the instant case precisely what claims plaintiff presented to the Board. It appears that the road claims never were presented and, of course, the breach claim for damages was beyond the Board's jurisdiction. Accordingly, in considering this issue, it has been assumed that the relief sought from the Board was permissive.

tion that the obligation to amend extends to claims accruing after a trial has been held and after the trial judge's decision has been rendered. While, in an appropriate case, it may be desirable even under those circumstances for a party to seek to amend, it does not follow that judicial economy, convenience, and fairness to litigants will always be served by imposing such a requirement either on the parties or the court.

In the context of this case, the Forest Service notice in December 1968 that no further extensions would be granted was the first indication to plaintiff that it may have another claim against defendant. At that point, plaintiff had several options. Plaintiff might have treated the communication as a breach, but because trial was completed and briefs had been filed in Tonga I, it would have had either to file a new petition or seek leave to amend the pending suit. Had the latter course been followed, and assuming such a belated request had been allowed, it still would have entailed additional discovery, a second trial in Seattle, Washington, and additional briefs by the parties. The alternative, and the one followed by plaintiff, was to seek resolution of the issue by asking the Forest Service to reconsider its position in light of specific reasons supporting the request for an extension. The latter approach was entirely reasonable and in keeping with the notion that parties should be encouraged to resolve their differences rather than rushing into court at the first hint of a claim.

By April, when the Forest Service had rejected the formal request for an extension, matters had changed somewhat. By that time, both parties were aware of the trial judge's decision and, as more fully discussed *infra*, the implicit assumption therein that plaintiff would receive all of the timber yet to be cut on Tonga Ridge. At that point, it would not have been inappropriate to bring the evolving controversy to the court's attention.

Neither party did so and, since the assumption in the trial judge's decision as to the volume of timber plaintiff would cut was only indirectly related to the computation of damages

and had no effect at all on the issue of defendant's liability,[3] it is understandable that they did not. Moreover, in view of the advanced stage of Tonga I, there would have been little, if any, savings in terms of convenience and expense to the litigants had they done so. The only potential saving is that, had the court been made aware of the additional claim by, say, May 1969, it might have suspended its review of the trial judge's decision pending a trial and decision on the additional count, thereby combining all matters in a single review. However, balanced against that saving is the substantial additional delay plaintiff would have encountered in obtaining a recovery on its breach of warranty claim.

Under the circumstances present in this case, it is concluded that it would be an unwarranted extension of *Electric Boat* to hold that plaintiff's failure to seek to assert the present claims in Tonga I bars it from any further relief. Accordingly, the defense based on splitting of the cause of action is denied.

II. The Refusal to Extend Claim

Plaintiff contends that defendant's refusal to grant a further extension of the contract which would have enabled it to cut the timber on Unit 15 was arbitrary and capricious and constituted a breach of the contract. Defendant denies that this is so, maintaining that the refusal was entirely proper in view of plaintiff's inability to perform the contract.

While plaintiff apparently construes the contract, particularly in light of the decision in Tonga I, as giving it an unfettered, absolute right to the timber remaining on Unit 15, neither the contract itself nor the court's earlier decision supports such a position. In Tonga I, the court was concerned with timber that defendant had warranted to be present but was not; here, the issue is as to timber that was present but

[3] Tonga I was only concerned wth timber warranted to be present but which in fact was not. In computing damages for the breach of warranty, it was necessary to determine the quantity of timber present on Tonga Ridge and then determine the damages to plaintiff, based on the difference between the timber that was there and the timber warranted to be there. In so doing, it was assumed that plaintiff would receive all of the timber that was present and the award of damages was based only on the missing timber. However, in making that assumption, the court credited plaintiff with recovering certain costs which, as appears *infra*, it in fact did not recover due to its failure to receive all of the timber present on Tonga Ridge.

which plaintiff did not receive. Although the court clearly assumed that plaintiff would receive all of the timber yet to be cut, nothing that was said in Tonga I can be construed as a holding that defendant was obliged to extend the contract *ad infinitum*.

That the original term specified in the contract, 5 years, was unrealistically short is undisputed. The parties contemplated, at the time of entering into the contract, that extensions of the term would be requested by plaintiff and granted by defendant. However, the contract itself offers no guidelines by which to govern the grant of those extensions.

But the evidence is clear that, at the time the contract was executed, the Forest Service had a well-established practice or custom with respect to granting extensions. As noted previously, this practice was a very liberal one in which extensions were granted with very little urging by the contractor, and plaintiff was well aware of that practice. In practical operation, extensions of contracts were always granted by the Forest Service unless there was a demonstrable disadvantage to the United States.

An oft-used principle in contract law is that where a well-established practice or custom is shown to exist, it is assumed that the parties to a contract intended that practice or custom to apply, in the absence of express language in the contract to the contrary. *Robinson* v. *United States*, 80 U.S. (13 Wall.) 363, 366 (1871); *John McShain, Inc.* v. *United States*, 199 Ct. Cl. 364, 462 F. 2d 489 (1972); *Buffalo Merchandise Warehouses, Inc.* v. *United States*, 115 Ct. Cl 568, 572, 88 F. Supp. 276, 277 (1950). Also, regulations in effect at the time of a contract are a useful guide in the resolution of a contract case. *Firestone Tire & Rubber Co.* v. *United States*, 195 Ct. Cl. 21, 444 F. 2d 547 (1971). Here, usual custom or practice was for the Forest Service to set a fixed term for performance; however, it was recognized by the parties that time was not of the essence and it was the practice of the Forest Service that the term originally set would be liberally extended in accordance with published Forest Service regulations. Those regulations, together with the custom of the Forest Service in granting extensions for a variety of reasons, make it clear that extensions would be granted, upon request, unless, as stated in

paragraph 2433.12 of the Forest Service Handbook, it would be "disadvantageous to the United States."

In entering into this contract, plaintiff had every reason to assume, there being nothing in the contract to the contrary, that it would receive extensions in accordance with the prevailing custom or practice. Indeed, the evidence is that, from 1960 to 1968, plaintiff did receive extensions on that basis. The rights and obligations of the parties under the contract must, therefore, be construed in light of this established practice or custom. *Stoeckert* v. *United States*, 183 Ct. Cl. 152, 165, 391 F. 2d 639, 647 (1968). If, in refusing to extend the contract for 1969, defendant departed from that practice, and in fact used a different basis in passing on the requested extension, plaintiff's claim for breach is sustainable. *Cf. Perry* v. *Sindermann*, 408 U.S. 593 (1972). Specifically, the question is whether defendant denied the extension because it was "disadvantageous to the United States" or on some other, and materially different, basis.

Although the warning in 1968 that no further extensions would be granted except "under extraordinary conditions" is not itself inconsistent with a determination by the Forest Service that further extensions would be disadvantageous to the United States, there has been no showing that the Forest Service evaluated the matter in that context. From the evidence, it appears that the warning was principally based on the belief that plaintiff would not make any effort to clear the remaining timber from Unit 15 until after the court's decision in Tonga I. However, even if the belief were correct, there is no evidence that the Forest Service made any determination that such inactivity by plaintiff would be disadvantageous to the United States.[4] In any event, and more importantly, testimony at trial revealed that this belief was based on no facts whatever and was sheer speculation by some of the Forest Service personnel. A standard of "disadvantageous to the United States" vests wide discretion in defendant in passing on requests for extensions. Even so, the exercise of that discretion must be fair and reasonable, not

[4] Although there is some indication the Forest Service wanted the timber cut so as to provide accurate information for use in Tonga I, the insubstantial nature of that interest is revealed by the fact the Forest Service had no intent to reoffer Unit 15 after plaintiff's contract was allowed to expire.

arbitrary and capricious. *Pacific Far East Lines, Inc.* v. *United States*, 184 Ct. Cl. 169, 184, 394 F. 2d 990, 998 (1968); *Gadsden* v. *United States*, 111 Ct. Cl. 487, 490, 78 F. Supp. 126, 128 (1948). To impose, unilaterally, an additional condition on further extensions merely on the basis of speculation is neither fair nor reasonable and is contrary to defendant's obligation to administer the contract in an evenhanded manner consistent with its well-established practices and published regulations.

What has been said, of course, does not establish an actionable breach for if, in refusing an extension for the 1969 season, defendant fairly determined that a further extension would be disadvantageous to the United States, the prior warning is irrelevant and plaintiff has no cause for complaint. But it is apparent that the requirement of "extraordinary conditions," rather than disadvantageous to the United States, was the basis for the determination not to extend the contract. That was the principal reason given to plaintiff,[5] and internal correspondence of the Forest Service confirms that to be the fact. That correspondence also indicates that the Forest Service, in early 1969, was still acting on the belief, unfounded in fact, that plaintiff was "holding back" from cutting the timber pending the outcome of Tonga I. None of the Forest Service employees testifying at trial knew of any disadvantage to the United States by a further extension of the contract. Nor is there any doubt that the efforts made by plaintiff in 1968 to remove the timber, together with the conditions it encountered on Unit 15 in that year, would have been accepted, in prior years, as sufficient grounds for granting a further extension. The fact is that the Forest Service's decision rested squarely on its determination that none of the excuses advanced by plaintiff amounted to "extraordinary conditions," a standard entirely different from that theretofore applied by the Forest Service, both under this contract and all other contracts.

[5] The additional reason stated to plaintiff that the timber was needed to relieve an acute lumber shortage played no part in the decision. In fact, the Forest Service had no intention of putting the timber on Unit 15 on the market and it was only at the urging of the Department of Justice attorney that it ultimately did so. The timber sold for *less* than what defendant would have received under the contract with plaintiff.

It is concluded that defendant had an obligation to administer this contract and to evaluate plaintiff's requested extension in conformity with its own regulations and its then-existing policy of granting extensions unless disadvantageous to the United States. Its unilateral imposition of an additional condition for obtaining an extension, having no apparent relation to its past administration of that policy, constituted a breach for which plaintiff is entitled to recover damages.

Turning to the matter of damages, plaintiff's claim is in two parts, the first seeking an award, in addition to that given in Tonga I, for loss of road amortization, and the second being based on the value of the timber it was denied from Unit 15.

As to the matter of road amortization, it is clear from finding 37, in Tonga I, that the award for road amortization was based on the assumption that plaintiff would cut all of the remaining timber on Unit 15. Based on that assumption, the computation included the uncut timber as a part of the timber volume plaintiff would realize under the contract. By reason of defendant's breach, the volume plaintiff received was less than that. By utilizing the computations employed in Tonga I, it appears defendant's refusal to permit cutting of the remaining 3,000 MBF on Unit 15 resulted in plaintiff failing to recover $29,295.27 of its road-development costs. The refusal having been improper, plaintiff is entitled to recover that amount as one element of damage flowing from the breach.

As to the timber itself, and after several revisions in its approach, plaintiff ultimately tried the case on a theory of lost profits, contending that it is entitled to the profits it lost as measured by the difference between the contract price and the price it would have received upon resale of the timber in the export market. According to plaintiff's calculations, this amounted to $145,846.05.

The usual measure of damages for the failure to deliver goods is the difference between the contract price the buyer was to pay and the fair market value of those goods. *Dulien Steel Products, Inc.* v. *United States*, 143 Ct. Cl. 484 (1958); MCCORMICK, DAMAGES § 175 (1935); Uniform Commercial Code § 2–713. In making its calculations, plaintiff's experts

took as fair market value the price the logs would have commanded in the export market in the latter part of 1969 and the first half of 1970 and, from this base, then calculated the profit plaintiff would have made at those prices.

Reliance on the export log market is inappropriate as a measure of damages.[6] Use of the export log price has the effect of treating the contract as one for the purchase of goods for resale. In a purchase for resale, it is appropriate to measure the buyer's damage upon nondelivery as the difference between the contract price and the price at which the goods were to be resold. *Benjamin* v. *United States*, 172 Ct. Cl. 118, 145, 348 F. 2d 502, 520 (1965); MCCORMICK, DAMAGES, *supra*. Had this been a purchase of timber for resale, the price plaintiff could have obtained in the export market would have been pertinent. However, this contract was not of that character. Plaintiff is a manufacturer of plywood, not an exporter of logs. Its timber purchases are for the purpose of supplying its plywood operations and it was for that purpose it entered the present contract. Nor is there a showing that an important part of its business consisted of selling logs to others at export prices. In that context, the foreseeable damages, *Dale Construction Co.* v. *United States*, 168 Ct. Cl. 692, 734 (1964), for which defendant is properly charged are the additional costs plaintiff incurred, or would have incurred, in procuring timber for its operations to replace the timber denied to it by defendant's breach.

Under the facts surrounding this contract, plaintiff's claim for lost profits based on resale of the timber in the export-log market must be viewed as consequential damages and can be recovered only if it is shown that defendant knew, or should have known, that plaintiff intended to resell a substantial number of the logs *and* that plaintiff sought to prevent its losses or mitigated its damages by procuring other timber. Uniform Commercial Code § 2–715. Neither condition has been satisfied in this case. As stated previously, plaintiff is a plywood manufacturer. There has been no showing that defendant had any reason to know that any substantial amount of the timber would have been used for any purpose other

[6] Equally inappropriate as transactional evidence of fair market value is the Great Northern sale, which was an export log sale.

than in plaintiff's operations. Nor is there any evidence that plaintiff ever advised defendant that it intended to export the logs remaining on Unit 15, or to sell a substantial number of them. Also missing is any evidence that plaintiff made any effort to cover by procuring or diverting other logs to the export market or that, if it did so, it suffered any damage whatever. In particular, although plaintiff logged more timber in 1969 than it had in previous years, and apparently exported some, there is no evidence that any portion of that timber was logged as a substitute for the Tonga Ridge timber or, if so, that it cost plaintiff anything more than the Tonga Ridge timber would have cost. Under these circumstances, plaintiff's claim for consequential damages must be denied.

Consequential damages not being recoverable, there remains the question of whether plaintiff is entitled to any damages at all. Had plaintiff procured timber to replace the Tonga Ridge timber, it would have been entitled to recover the amount it had to pay in excess of the contract price. There is no evidence that this happened. In fact, it appears that plaintiff had a number of contracts with the Forest Service and had no difficulty in obtaining as much timber as its operations could handle. Nonetheless, to the extent the contract price was below fair market value, plaintiff is entitled to the benefit of its bargain as measured by that difference.

But therein lies the real difficulty. Plaintiff's evidence as to fair market value is based on the inappropriate resale price for export logs. This evidence is inappropriate because, as already suggested, there is insufficient showing that the plaintiff or any manufacturers of plywood would have resorted to the export market to buy logs for manufacturing purposes. The appraisals conducted by the Forest Service in redetermining the rates for Unit 15 and the subsequent resale of that timber by the Forest Service are the only other evidence bearing on this issue. That evidence is that the Forest Service appraised the timber on Unit 15 for 1969 at about $50 per MBF, established an advertised bid rate of $47.40 per MBF, unsuccessfully offered it at $34.50 per MBF and ultimately sold it at $23 per MBF. Under the contract, plaintiff was obliged to pay a minimum of $26.55 per MBF

for approximately 1,300 MBF and a redetermined rate for the remainder. However, even the $26.55 was only a minimum figure, for the Service had the right to redetermine the rate upward any time it extended the contract. In fact, it never did raise the rate, and did not plan to do so in 1969, because of the road amortization. This is clear from its redetermination appraisal for 1969 where it allotted a figure of $46.29 for road amortization, thereby arriving at a redetermined rate of $3.20 to be charged plaintiff. However, by the award in Tonga I and the additional award for road amortization it is entitled to receive in this case, plaintiff has been fully compensated for its road-development costs, so road amortization is no longer a factor to be included in determining the stumpage rate plaintiff was to pay under the contract. Thus, considering the road fully amortized, plaintiff is not entitled to the $3.20 rate as a contract price but rather the rate should be increased by $46.29.

What all of this adds up to is that, by reason of the redetermination provision, and assuming no factor for road amortization, plaintiff would have been obliged in 1969 to pay a contract price that was reasonably reflective of fair market value.[7] Stated otherwise, the evidence indicates that the price plaintiff would have had to pay, had it sought to procure comparable timber in the marketplace, would have been essentially the same as the redetermined value it was obligated to pay for the timber under the contract. If anything, the evidence suggests that plaintiff would have paid less in the marketplace. This is borne out by the redetermined value of approximately $50 established for 1969 as compared to the advertised bid rate of $47.40, the offer at $34.50, and the actual sale of that timber at $23.

Under these circumstances, it is concluded that plaintiff suffered no compensable damage by the denial of the timber and is entitled to no recovery on this phase of its claim. *Gulf Chemical Metallurgical Corp.* v. *Sylvan Chemical Corp.*, 122 N.J. Super. 499, 300 A. 2d 878, *aff'd*, 126 N.J. Super. 261, 314

[7] Although plaintiff argues that the Forest Service redetermination appraisals do not reflect fair market value, the court's findings 14 and 15 in Tonga I are to the contrary and are controlling here. In any event, there is no evidence from which it can be determined how much, if any, the appraisal is below fair market value.

A. 2d 73 (1973). In so concluding, it is recognized that this court has, where the proofs are uncertain but it is clear some damages were suffered, entered a judgment in the nature of a jury verdict. See, *e.g.*, *Specialty Assembling & Packing Co.* v. *United States*, 174 Ct. Cl. 153, 355 F. 2d 554 (1966). That approach is deemed inappropriate here because it has not been satisfactorily shown that plaintiff suffered any damage not otherwise compensated for by the additional road-amortization award.

III. Road Repair and Maintenance Claims [8]

The first of these claims occurred in early 1968, when the main Tonga Ridge road was washed out. (Findings 9–11.) The contracts for two of the three timber sales serviced by that road required defendant to bear all of the repair costs. The other contract, the one here in issue, placed the burden for road repairs on plaintiff. Defendant refused to share in any of the costs initially incurred by plaintiff in repairing the road and agreed to defray only 5% of those costs thereafter.

Defendant's argument that plaintiff repaired the road as a "volunteer" is utterly without merit. Plaintiff, before undertaking the work, asked defendant to share in the cost, and defendant promised to have a response in 10 days. Four months elapsed before defendant replied. In the meantime, plaintiff had to proceed with the repairs if it was to have any hope of completing operations on Unit 15 in the 1968 season. Having inexcusably delayed in responding to plaintiff's request, defendant is in no position to reap the benefits of plaintiff's labors on the basis they were volunteered.

Nor can defendant's contention that it was obligated only to pay 5% of the costs be accepted. That figure might have validity if the costs were for repairs occasioned by past use of the road, but that is not the case here. The repairs were needed to restore the road for future logging operations and as to those, 80.5% of the timber remaining to be transported over the road was from sales on which defendant was obliged to bear the repair costs. Applying that percentage, defend-

[8] Although not raised by the pleadings, defendant offered no specific objection and plaintiff was permitted to proceed at trial. (See Rule 39(b).)

ant should have borne $5,275.56 of the costs, and plaintiff is entitled to reimbursement in that amount.

The other road claim is as to maintenance work performed in 1969 by plaintiff under section 40(1) of the contract. That provision required plaintiff, at the conclusion of the contract, to perform final maintenance work on the roads. Consistent with its position that the contract was at an end, the Forest Service, on May 14, 1969, directed plaintiff to perform this work.

It is clear that, under the contract, plaintiff had the obligation to maintain the roads, both at the close of each season and at the termination of the contract. It is unclear from plaintiff's proofs precisely what work was done and for what purpose since some of the work was apparently performed prior to the directive by the Forest Service on May 14, 1969. In any event, there is no evidence that the maintenance work was anything other than what was required of plaintiff under the contract.

Since there is nothing in the contract to indicate that this obligation was dependent or contingent on plaintiff's cutting any specific volume of timber, the question is simply whether, by reason of defendant's breach, plaintiff was excused from performance of this obligation under the contract.

It is concluded that it was not. When, in 1969, defendant refused to grant a further extension, plaintiff had already cut and removed 43,000 M board feet of the total 46,000 M board feet available. Plainly, defendant's breach neither defeated the whole purpose of the contract nor deprived plaintiff of substantially all that it had bargained for. To the extent it was deprived of anything, plaintiff has, through recovery of the road amortization, been fully compensated for all the damages it has been able to prove. Giving consideration to all of the circumstances, RESTATEMENT, CONTRACTS § 275 (1932), it is concluded that defendant's breach was not of such a character as to relieve plaintiff of its obligation to perform road maintenance at the conclusion of the contract.

Accordingly, plaintiff is not entitled to recover the costs it incurred in meeting its obligations under the contract.

In summary, plaintiff is entitled to recover a total of $34,570.83.

FINDINGS OF FACT

The court, having considered the evidence, the report of Trial Judge Hal D. Cooper, the briefs and argument of counsel, makes findings of fact as follows:

1. In *Everett Plywood & Door Corp.* v. *United States*, 190 Ct. Cl. 80, 419 F. 2d 425 (1969), plaintiff recovered damages it suffered by reason of a breach by defendant of a warranty of quantity. The contract there in issue is the same contract involved in this suit; findings 1–3, 6–8, 10–17, 29, and 30, made in the prior suit and incorporated herein by reference, provide some of the background of the contract and a summary of the pertinent events up to July 1967.

The duration of the contract, executed in 1955, was specified in the following language:

> Period of Contract.—3. Unless extension of time is granted, all timber shall be cut and removed and the requirements of this agreement satisfied on or before December 31, 1960. Unless such amounts are changed in writing by the Regional Forester, at least 45,000 M board feet shall be cut prior to June 1, 1959.

2. Plaintiff is a cooperatively owned and operated plywood mill that obtains the predominance of the timber used to produce plywood from federal timber lands. Hemlock and fir are two species used in the production of plywood. Logs not usable in its operations are either sold or bartered to sawmills for logs that can be used. The logs plaintiff uses are the higher-grade logs.

In a sense, a cooperative mill is not run for profit; the principal objective is to keep the plant operating in order to provide jobs for its shareholders. When the company makes a profit, wages are raised, dividends may be paid to the shareholders, and the value of the shares increases. However, the first consideration in determining the disposition of timber is the requirements of the mill and the logs needed to keep the mill operating. Aside from that, its logging operations are in large part governed by plywood prices. When plywood prices are low, plaintiff reduces its logging operations and will use the low plywood prices as the basis for requesting extensions of its timber sale contracts. Although depressed for

a number of years, plywood prices peaked in September 1968 through April 1969, plummeting again in the summer of 1969.

3. Under the contract in suit, plaintiff received, upon request, successive one-year extensions up through 1967. By that date, only a part of Unit 15 on Tonga Ridge remained to be cut. On January 4, 1968, plaintiff requested a further extension of the Tonga Ridge contract, from March 31, 1968 to March 31, 1969, assigning as the reason therefor the difficulties presented by the short logging season at the high elevation at which Unit 15 was located. The request closed with the statement that "we should have no trouble completing the sale this coming season."

4. Applicable regulations governing extensions were stated in the Forest Service Handbook at page 191:

> *2433.1—Extension of Timber Sale Contracts*
>
> * * * * *
>
> *2433.12—Procedure.* Ordinarily, the timber sale contract is written on the basis that time is not of the essence. The termination date is fixed when the sample contract is drafted and thus becomes a condition of sale, * * * an extension of time may be granted by the officer approving the sale, his successor, or his superior, unless disadvantageous to the United States.

5. Plaintiff had never been denied a requested extension of the termination date of a timber sale contract on any Forest Service timber sale; nor is there any evidence that the Forest Service denied requested extensions of timber sale contracts to other purchasers prior to 1969. Extensions of such contracts were in fact granted with very little urging and for a wide variety of reasons ranging from bad weather to unfavorable economic conditions. It was a well-established practice, known to all in the business and in effect throughout the period of the contract, that the Forest Service would grant an extension of a contract if a contractor had a reasonable basis for the request and there was no disadvantage to the United States. Logging difficulties encountered at high elevations were an acceptable basis for requesting an extension.

6. In granting plaintiff's requested extension to March 31, 1969, the Forest Service advised plaintiff, on April 8, 1968,

that "only under extraordinary conditions will this sale be considered for another extension."

7. In 1967, a fire damaged timber belonging to the Weyerhauser Company. By agreement dated April 22, 1968, plaintiff agreed to purchase this fire-damaged timber, agreeing to log an estimated 5,843 MBF by November 1, 1968. This agreement was known as the "14–J sale."

8. Plaintiff employs no loggers and does not engage in any logging operations. All of its logging operations are performed by independent logging companies. In a given year, plaintiff bids on 100–200 sales and obtains timber from some 25 sales. It attempts to retain loggers on a year-round basis by having them work on high-elevation sales in summer months and then move to low-elevation sales in the winter months. Nelson Bros. had contracted with plaintiff in August 1967 to complete work on the northern part of Unit 15, Tonga Ridge. By purchasing the 14–J timber and subcontracting with Nelson Bros. to log that timber, plaintiff was able to induce Nelson Bros., by contract of May 22, 1968, to log the southern part of Unit 15 as well.

9. In the winter of 1967 and the spring of 1968, a severe washout of the mainline Tonga Ridge road knocked out several legs of the switchback. This road had to be rebuilt prior to the commencement of operations on Unit 15 in 1968. The mainline road to Tonga Ridge provided access to three separate Forest Service timber sales to plaintiff: Tonga Ridge, Tonga Deception, and Carroll Creek. Section 40 of the Tonga Ridge contract required plaintiff to perform all road repairs and maintenance for that sale. The Tonga Deception sale, on the other hand, placed the burden of repair costs on defendant. The Carroll Creek sale placed the burden of repair costs on defendant if the damage to the road was extraordinary. The washout was extraordinary damage.

On April 24, 1968, plaintiff requested the Forest Service to share in the cost of the necessary repairs. On May 24, 1968, defendant replied that plaintiff would have its answer within 10 days. The answer was not received, however, until September 25, 1968.

10. Plaintiff, in good faith, started the road repairs in June and they were accomplished by July 10, 1968. Nelson Bros.

did the work and that work was a prerequisite to its being able to move into Unit 15 in July 1968. The repair cost was $6,553.50. Defendant's letter of September 25, 1968, in reply to plaintiff's request for a sharing of road costs, stated that defendant would share in any future road-repair costs to the extent of 5%. The 5% figure was chosen on the basis that, of the timber moved on Tonga Ridge road up to the time of the washout, only 5% was timber other than from the Tonga Ridge sale. The letter further stated that the repair done during June and July, 1968 was "voluntary" and therefore would not be reimbursable by defendant even to the extent of 5%.

11. Had defendant's prorata share of the road repairs been determined according to the amount of timber remaining to be logged from the three sales serviced by the road, defendant's share of the expenses would have been 80.5% of the repair cost of $6,553.50, or $5,275.56.

12. Due to the high elevation and the short season, logging on Unit 15 was unpredictable. Snow and wet conditions, both in the late spring and early fall, are normal conditions which greatly foreshorten the available time for logging operations. The rugged terrain added to the difficulties to be expected in logging the timber.

13. In July 1968, when enough snow had melted to permit operations to begin, a part of Nelson Bros.' men and equipment moved into Unit 15 and began building spur roads and logging operations. The construction of the spur roads was hampered by wet weather and an excessive amount of surface water and muddy conditions. The road construction under such conditions was too costly, and the construction of the spur roads was suspended. Meanwhile, logging operations continued; however, Nelson never did set up a yarder on Unit 15, using only a loader, a piece of equipment used for logging short distances along a spur and with small crews. It was impossible to have completed logging Unit 15 in 1968 without a yarder. Nelson's yarder, together with the rest of its men and equipment, was engaged in logging the 14–J sale for plaintiff, with logging of that sale continuing on into October. Nelson left Unit 15 on October 23, 1968, after a snowstorm of at least

2 feet, and briefly logged for plaintiff at Carroll Creek which was at an elevation 500 feet lower than Unit 15.

14. It does not appear that plaintiff made any special efforts to complete logging on Unit 15 during the 1968 season. Its logger, Nelson Bros., was the only logger plaintiff planned to use on Tonga Ridge that year and the same logger was to handle the 14–J sale as well. Plaintiff's failure to complete the Tonga Ridge sale in 1968 was due to the wet conditions encountered, the consequent delay in construction of a spur road, and Nelson's lack of available capacity to handle the volume of logging contracted to it by plaintiff in 1968. None of the factors affecting plaintiff's operation on Tonga Ridge in 1968 appear to be classifiable as "extraordinary." However, plaintiff made reasonable efforts to log Unit 15 in 1968 and its operations were consistent with those to be expected of any contractor.

15. The following table shows the quantity of timber (MBF), logged by Nelson Bros. for plaintiff in the period May 1 through November 30, 1968:

Sale

	Barclay Creek	*Carroll Creek*	*Tonga Ridge*	*Weyerhaeuser 14–J*	*Johnson Creek*	*Monthly subtotal*
May				154	349	503
June				832		832
July			133	719		852
August			263	724		987
September	6		152	824		982
October	32	238	751	138		1,159
November	1,241					1,241
Sale subtotal	1,279	238	1,299	3,301	349	
Total						6,556

The amount of timber still to be logged on Unit 15 at the close of the 1968 logging season was:

	M board feet
White fir	1,666
Hemlock	1,277
Alaska yellow cedar	48
Total	2,991

16. The letter of April 8, 1968, advising plaintiff that no further extensions were to be granted except for "extraor-

dinary circumstances" was written to carry out instructions of the associate deputy chief of the Forest Service, dated March 8, 1968, which stated:

> Your letter to the company extending the sale and establishing the rates should emphasize the need to complete the cutting during the extension period. The file indicates the sale has been extended nine times.

17. Prior to his letter of March 8, 1968, the chief received copies of a memorandum written on February 1, 1968, by A. Mason, forester. That memorandum included the following:

> I personally doubt that the company [Everett] will do much to remove the remaining sale timber until the results at the hearing are known. (My doubts are shared by a number involved in this sale).

Testimony at trial, including that of A. Mason, revealed that there was no factual basis for the above-quoted statement. Mason referred to it as "speculation."

18. Prior to plaintiff's actual request for an extension for the 1969 logging season, defendant determined that no extension would be granted. A letter to the chief from the regional forester on November 29, 1968, included the following:

> It appears that the purchaser has made no real effort to complete the sale prior to the March 31, 1969 termination date. It is improbable that the sale will be accessible for logging during the remaining four-month period. The sale has been extended eight times since the original termination date of December 1960. It seems probable that the purchaser is deliberately holding back on the operation of the contract, pending the outcome of Court of Claims Case No. 40–64.

The reply on December 9, 1968 stated in part:

> We have reviewed your recommendation not to extend the Tonga Ridge sale beyond its present termination date of March 31, 1969.
>
> As you point out, this sale has already been extended eight times, since its original expiration date in 1960. Further, it can be resold at rates higher than current contract rates.
>
> The purchaser was warned, in the Forest Supervisor's letter of April 8, 1968, that the sale would not be considered for any further extension, except for "extra-

ordinary conditions." Conditions this summer were such that he could easily have finished logging the sale if he had chosen to do so.

Accordingly, you are authorized to inform the purchaser immediately that the case has been reviewed by the Chief, to remind him of the April 8 warning, and further inform him that there were no "extraordinary conditions" involving logging the sale this year. Therefore, the Forest Service does not choose to extend the sale, which will expire on March 31, 1969, as scheduled.

This decision was relayed to plaintiff on December 20, 1968.

19. By letter of January 24, 1969, plaintiff formally requested an extension for the 1969 logging season. The following events then occurred:

February 25, 1969—Plaintiff's request denied by the Forest Supervisor;
March 20, 1969—Trial Judge Hogenson's decision in Tonga I handed down;
March 31, 1969—Forest Service extended contract from March 31, 1969 to April 30, 1969 to permit further evaluation of plaintiff's request for an extension;
April 22, 1969—Deputy Chief, Forest Service, upheld the denial of a further extension;
April 30, 1969—Plaintiff requested reconsideration;
May 15, 1969—On reconsideration, defendant denied extension;
June 12, 1969—Plaintiff appealed to Board of Forest Appeals. Board instructed Forest Service not to resell the timber until Board had acted.
June 1969—Plaintiff filed suit seeking an injunction against resale of timber. Suit was ultimately dismissed;
August 30, 1969—Forest Service advertised remaining timber on Unit 15 for resale;
November 18, 1969—Forest Service readvertised Unit 15 timber and sold it;
December 12, 1969—Court of Claims issued per curiam decision in Tonga I;
March 10, 1970—Board dismissed plaintiff's appeal;
March–April 1970—Board granted plaintiff's motion for reconsideration;
October 1970—Hearing held before the Board;
February 2, 1971—Board vacated prior dismissal but dismissed appeal for lack of jurisdiction in view of prior sale of Unit 15 timber;

September 27, 1971—Plaintiff filed suit in the Court of Claims.

20. In denying plaintiff's requested extension, the Forest Service relied on the absence of any "extraordinary conditions" encountered by plaintiff in 1968. It made no determination that the extension would be disadvantageous to the United States. There was an indirect reference to that standard in the letter of April 22, 1968, where an acute shortage of lumber was asserted as one reason for requiring plaintiff to cut the timber during 1968. Although this implied that the Forest Service was anxious to have Unit 15 cut to help alleviate the market shortage, the fact is that the Forest Service, at that time, did not intend to reoffer Unit 15 for sale, the market shortage notwithstanding. It was only at the urging of the Department of Justice, for reasons unrelated to market conditions, that it was reoffered and sold in 1969.

21. Paragraph 40(1) of the contract included the following provision:

> (1) *Maintenance of Roads Constructed or Reconstructed by the Purchaser:* * * * Upon the termination of this agreement and on seasonal operations at the end of the operating season, maintenance work will be done to minimize damage from the elements, such as a final blading to remove ruts and other irregularities that would prevent normal road surface runoff, and a final clearing of drainage ditches and culverts as necessary to insure satisfactory functioning of the road drainage system.

By a directive dated May 14, 1969, plaintiff was required to perform final maintenance work on the roads. Based on work performed during the period January to October, 1969, plaintiff expended $14,422.72 in performing the final maintenance of the roads.

22. In early 1969, defendant reappraised Unit 15 and redetermined the rates to be charged in the event the contract was extended for the 1969 season. The redetermined rate for hemlock, in excess of competitive quantities, was $3.20 per MBF; however, in arriving at that figure, defendant credited plaintiff with road amortization at the rate of $46.29. Without a road-amortization credit, defendant's appraisal computa-

tion would have resulted in a redetermined stumpage rate of approximately $50, or more. The figure of $46.29 was far in excess of the road-amortization rates set in the contract (finding 17, Tonga I) and would have permitted plaintiff to amortize the road at a much more rapid rate. Thus, at a competitive-volume price of $26.55, timber appraised at $50 would have given plaintiff an amortization rate of $23.45 while, on volumes in excess of competitive volumes, the redetermined price of $3.20 would have given plaintiff the $46.29 rate for road amortization.

23. In 1969, the Forest Service appraised Unit 15 and established an advertised rate of $47.40 for hemlock. When, on September 30, 1969, the Forest Service attempted to sell the remaining timber on Unit 15, eight bidders were present but no bids were received at the advertised minimum price of $34.45 per MBF. The subsequent sale of the timber, on November 18, 1969, was at $23 per MBF.

24. Plaintiff presented expert testimony on the issue of fair market value. Its experts appraised the timber to a log market, as opposed to the analytical-appraisal procedure used by the Forest Service. (Finding 15, Tonga I.) The value the experts assigned to the timber, $63 per MBF, was based on average export prices for logs in the fourth quarter of 1969 and the first two quarters of 1970, reduced by the cost of logging the timber and putting the logs "in the pond."

Although it did export some logs in 1969, plaintiff is not in the business of exporting logs, the great bulk of its logs being used in its plywood operations. The Tonga Ridge timber was purchased by plaintiff in 1955 for use domestically, not for export. There is no evidence that plaintiff ever informed the Forest Service that it intended to export any substantial number of the logs from Tonga Ridge and it was not until immediately prior to trial that plaintiff asserted a claim for damages on that basis.

Plaintiff offered no evidence as to what the fair market value of the timber would be to a purchaser, such as plaintiff, who was in the business of manufacturing plywood and was seeking to obtain timber for its plywood operations. The Great Northern Sale, on which plaintiff relies, was an export log sale.

Conclusion of Law

25. The liberal extension policy of the Forest Service was changed drastically after 1970. The Forest Service Manual for May 1, 1972, states:

2451.82—Period of Contract (B8.2, A19).

* * * * *

The contract period will be established with consideration of the size and type of offering. It should be long enough to minimize the need for extension action.

* * * * *

Sale size:	*Operating seasons*
Up to 2 MMBF	2
2–5 MMBF	3
5–10 MMBF	4
10–25 MMBF	5
Over 25 MM3F	6 or more

Variations from the above guidelines may be appropriate in the following circumstances:

1. Additional time should be considered for such special requirements or conditions as extensive road construction. * * * Additional operating seasons may also be necessary for high elevation sales with abnormally short operating seasons.

26. Finding 37 in Tonga I was based on the assumption that plaintiff would cut 40,000 MBF of hemlock to be amortized at $6.72 and 1,717 MBF of hemlock to be amortized at $11.79. In fact, plaintiff cut only 38,653 MBF. The calculation in finding 37, when adjusted to reflect the timber plaintiff failed to realize as a result of defendant's breach, is:

Fir	$50, 150. 52
Cedar	8, 681. 31
Pine	3, 507. 00
Hemlock—38,653 at $6.72	259, 748. 16
Total	$322, 086. 99
Unrealized Road Amortization	$351, 382. 26
	−322, 086. 99
Total	$29, 295. 27

CONCLUSION OF LAW

Based upon the foregoing findings of fact and opinion, which are adopted by the court and made a part of the

judgment herein, the court concludes as a matter of law that plaintiff is entitled to recover, and judgment is entered for plaintiff in the sum of $34,570.83.

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510 F. 2d 1379

VICTORY CONSTRUCTION COMPANY, INC. AND PAUL KRUMMEL (A JOINT VENTURE) v. THE UNITED STATES

[No. 8–73. Decided February 19, 1975]

ON PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

Contracts; Variations in Estimated Quantities Clause; overruns; contract unit price; equitable adjustment for excess.—Plaintiff was awarded a contract by the Army Corps of Engineers for modification of certain flood control structures on the Mississippi River. The storm sewer work, for which the contract provided by reference to estimated quantities of individual items, each with its own unit price, was performed by a subcontractor on whose behalf plaintiff brings this suit. During contract performance the actual work performed on five items of the subcontract work was more than 115% of the estimated quantities (per Government order). The contract included a variance in quantity clause required by an ASPR then in force. That ASPR was subsequently revised to expressly provide that unit price adjustments under the mandatory quantity variance clause "shall be based upon any increase or decrease in costs due solely to the variations above 115% or below 85% of the estimated quantity." In determining the adjusted unit price for each of the items involved in the overrun, the contracting officer read the quantity variance clause as calling for the repricing of excess quantities on the basis of the contractor's average actual cost of providing the entire quantities (both base and excess) of each of the items involved in the excess, plus an allowance for a "reasonable" profit thereon, and under that approach, found that downward adjustments in unit price for the excess quantities were warranted. In doing this, however, he expressly concluded that the revision of the earlier ASPR provision was a clarification, not an alteration of its meaning. The Contract Appeals Board apparently agreed with this interpretation. Plaintiff contends that, inasmuch as its cost of performing the work for such quantities in excess of 115% of defendant's estimated quantities for the disputed items was greater, and not lower, than the cost of performing the first 115% of the work on such items, it is entitled to be paid for all of the excess quantities at the contract unit price. On appeal, the Contract Appeals Board upheld the contract-

Syllabus

ing officer's determination by agreeing with his pricing standard and by placing the burden on the contractor of affirmatively establishing the price to which it claimed entitlement on the overrun quantities—a burden that it found not met on the record before it. Plaintiff seeks to reverse the decision of the Board rejecting its position. For purposes of the present decision, the court accepts the language of the ASPR revision as a clarification of the meaning intended by its predecessor provision. It is *held* that it is not reasonably possible to conclude that the quantity variance clause contemplates a complete repricing of the contract items which vary from the estimated quantities by more than 15%. The court rejects the interpretation embraced by the contracting officer and the Board as necessary to discourage contractors from allocating a disproportionate share of indirect costs and anticipated profit to the unit prices bid for those items on which overruns were anticipated; to undertake the implementation of an unarticulated procurement policy would amount to an impermissible overreaching of the court's legitimate role. Since defendant as the proponent of a departure from contract price, has failed to discharge its burden of proving that cost economies attributable to excess volume were realized, plaintiff is entitled to recover on behalf of its subcontractor. Defendant's motion for summary judgment is denied, plaintiff's cross-motion is granted, and judgment is entered for plaintiff for $81,784.23.

Contracts; changes; equitable adjustment; measure of adjustment; burden of proof.

[1] In a contract dispute involving the amount of equitable adjustment on account of a variation in estimated quantities, where the Government is the proponent of the equitable adjustment it has the burden of proving the extent of any downward departure from the unit price established by the contract for the items comprising the excess work.

United States ⟸ 73(4)

Contracts; Armed Services Procurement Regulations; retroactivity principles not involved when subsequent Regulation deemed a clarification rather than a change.

[2] Where the language of a revision to an Armed Services Procurement Regulation is intended as a clarification rather than a change, a view which defendant espoused during administrative proceedings, the revision's subsequent effective date does not detract from its relevance to an interpretation of its predecessor, which was in force when the subject contract was entered into.

United States ⟸ 73(12)

Contracts; Armed Services Procurement Regulations; applicability; generally.

[3] Applied in relevant context, an Armed Services Procurement Regulation has statutory status. In the absence of exceptional cir

cumstances, it is appropriate to accord the language of such a regulation, just as a statute, its ordinary, everyday meaning.

United States ⇐ 73(9)

Contracts; interpretation; clauses required by statute or regulation; variation in estimated quantities; price adjustment, effect on.

[4] Where the language of an Armed Services Procurement Regulation requiring inclusion of a quantity variance clause in a contract expressly provides that price adjustments on quantity overruns or short-falls be based upon any increase or decrease in costs due solely to the variation above 115% or below 85% of the estimated quantity of a pay item, an interpretation of the contract variance clause as allowing a complete repricing of the variance quantities based on average actual costs of total performance of the pay items involved in the variance is not reasonable.

United States ⇐ 73(12)

Contracts; interpretation; intent of one contracting party; implementation of procurement policy.

[5] Where the Government attempts to justify its expansive construction of an ASPR as approving *de novo* repricing of excess or short-fall procurement under an estimated quantity contract clause on the ground that such an interpretation is necessary to the discouragement of "unbalanced bids" by contractors, neutralization of the vice perceived can be properly and readily accomplished by those officials charged with responsibility for formulating procurement policy and effectuating it by adoption of appropriate contract language and regulations. For this court, in the name of "interpretation" to undertake the implementation of a totally unarticulated procurement policy, however worthy, would amount to an impermissible overreaching of its legitimate role.

United States ⇐ 73(12)

Richard W. Miller, for plaintiff. *George T. O'Laughlin*, attorney of record. *William E. Simmons*, of counsel.

Ray Goddard, with whom was *Assistant Attorney General Carla A. Hills*, for defendant.

Before DURFEE, *Senior Judge*, SKELTON and KASHIWA, *Judges*.

PER CURIAM: This case comes before the court on defendant's request, filed June 12, 1974, for review by the court of the recommended decision filed April 12, 1974, by Trial Judge George Willi pursuant to Rule 166(c) on plaintiff's motion and defendant's cross-motion for summary judgment. Upon

consideration thereof, together with the opposition thereto, and the briefs and oral argument of counsel, since the court agrees with the trial judge's recommended decision, as hereinafter set forth, it hereby affirms and adopts the same as the basis for its judgment in this case. Therefore, defendant's request for review and motion for summary judgment are denied, plaintiff's motion for summary judgment is granted and judgment is entered for plaintiff in the sum of $81,784.23.

OPINION OF TRIAL JUDGE

WILLI, *Trial Judge:* On August 6, 1965 the Army Corps of Engineers awarded plaintiff, two general contractors associated in a joint venture, a $465,395.80 contract for modification of certain existing flood control structures along the west bank of the Mississippi River at St. Louis, Missouri. The job included the refurbishing and alteration of storm sewers comprising a part of the control complex. That work, for which the contract provided by reference to estimated quantities of individual items, each with its own unit price, was performed by a subcontractor, Western Waterproofing Co., Inc. In the course of performance the Government ordered increases in the estimated quantities of five categories of the subcontract work. Western did its job so diligently and efficiently that in thirty days it not only completed the work for which the contract allotted 270 days' performance time, but finished all of the Government-ordered increases as well.

The present suit is brought on behalf of Western Waterproofing to reverse a decision of the Corps of Engineers Board of Contract Appeals (the Board) upholding the contracting officer's determination as to the amount of compensation due Western for the additional work that it performed at the Government's behest. 69–2 BCA ¶7920.

The issue presented by the parties' cross-motions for summary judgment is the extent to which that decision merits the finality accorded by the interaction of the standard Disputes clause of the contract and the applicable criteria of the Wunderlich Act, 68 Stat. 81, 41 U.S.C. §§ 321–22 (1970).

In addition to a conventional Changes article, the subject contract included among its Special Provisions a clause re-

quired by the Armed Services Procurement Regulations [1] in all "* * * contracts containing estimated quantity items when the Contracting Officer has reserved the right to vary the estimated quantity during the performance of the work to accommodate actual conditions encountered" as follows:

> SP-6. *VARIATIONS IN ESTIMATED QUANTITIES (JAN. 1965).*—Where the quantity of a pay item in this contract is an estimated quantity and where the actual quantity of such pay item varies more than fifteen (15%) percent above or below the estimated quantity stated in this contract, as it may hereafter be modified, an equitable adjustment in the contract unit price shall be made upon demand of either party. If the quantity variation is such as to cause an increase in the time necessary for completion, the Contracting Officer shall, upon receipt of a written request for an extension of time within ten (10) days from the beginning of such delay, or within such further period of time which may be granted by the Contracting Officer prior to the date of final settlement of the contract, ascertain the facts and make such adjustment for extending the completion date as in his judgment the findings justify. If the parties fail to agree upon an equitable adjustment in the contract price or time the dispute shall be determined as provided in the clause of this contract entitled "Disputes."

The quantity overrun that invoked the procedure defined by paragraph 6 of the Special Provisions occurred with respect to the five items of sewer alteration work identified below by contract Item Number, Estimated Quantity, Actual Quantity, Excess (in units) of Actual Quantity over 115 percent of Estimated Quantity, Unit Price Estimated by the Government Prior to Bidding, Unit Price per Award, and Unit Price Allowed by the Contracting Officer for Equitable Adjustment purposes.

Item No.	*Est. Quan.*	*Unit*	*Actual Quan.*	*Quantity Above 115% of Estimate*	*Govt. Est. Unit Price*	*Unit Price Per Award*	*Unit Price on Excess Per Equit. Adj.*
17	9	ea.	11	.65 ea.	$101.45	$1,085.70	$324.30
18	300	lin. ft.	394.71	49.71 lin. ft.	$66.30	$92.40	$27.62
19	15	sack	94.70	77.44 sacks	$269.30	$856.90	$256.15
20	90	sack	116.83	13.33 sacks	$327.35	$561.85	$167.94
21	15	sack	62.37	45.12 sacks	$579.50	$856.90	$256.07

[1] 32 C.F.R. § 7.603-27 (1967).

Opinion of Trial Judge

On April 15, 1966, after Western's sewer work had been completed and the precise extent of additional work became known, the contracting officer wrote the plaintiff a letter detailing the overrun items and quantities and making the following statements with respect to them:

> Examination of your unit prices for the above-listed items reveals these prices are in excess of amounts considered equitable for the work. Therefore, in accordance with the provisions of paragraph SP–6 of the contract specifications, you are hereby notified that equitable downward adjustments in unit prices for the excess quantity of these items are deemed warranted.
>
> It is requested that you furnish a proposal reflecting such reductions. Said reductions shall apply only to the quantity in excess of 115 percent of the estimated contract quantity of each respective item. Your proposal shall be broken down into labor, plant and material costs and should be in sufficient detail to permit prompt evaluation.
>
> * * * * *

In determining the adjusted unit price for each of the items involved in the overrun, the contracting officer adhered to the approach indicated by his opening observations and directives. He evidently conceived the quantity variance clause, in an overrun situation, as not only entitling the Government to insist on an equitable adjustment of contract price for units in excess of 115 percent of those specified in the contract but also as limiting the price payable on such excess units to that which the contractor could affirmatively justify on the basis of his actual cost experience in performing the basic contract requirements for the same items. In short, he placed on the contractor the burden of proving the price to which it was entitled for the overrun units. In net effect, he treated the excess portion of the work as though it had been performed under a retroactive type of fixed-price redeterminable contract. 32 C.F.R. §§ 3.404–1, 3.404–6 (1969).

Although Western Waterproofing insisted to the contracting officer that a proper interpretation of the applicable ASPR provision expressly prohibited a reduction of contract unit price in the circumstances presented and further contended that the contract unit prices, as applied to the

overrun quantities, were equitable in any event,[2] it nonetheless complied punctually with his demand for its cost records. By a letter of August 7, 1967 the contracting officer informed the plaintiff that he rejected Western's arguments in support of its request for payment at contract unit prices on the overrun quantities. He added:

> I will now proceed to prepare a reasonable cost estimate based on actual Corps of Engineers field records and other information available covering the entire operation, including overhead, but exclusive of mobilization and demobilization. This total cost will be prorated among the overrun items to determine an estimated actual cost per unit of each item. This estimated actual cost per unit plus an equitable profit factor will thus become the new unit price for the quantities in excess of 115 percent of the estimated contract quantities.
>
> * * * * *

It was the above method that the contracting officer employed to arrive at the equitable adjustment that is the subject of the present suit.

Since separate records had not been maintained on the work in excess of 115 percent of contract quantities, it was impossible to determine the actual cost of performing that excess, either in the aggregate or for any of the individual categories of work involved. The records were adequate, however, to enable the parties to agree on the total direct cost of performing the entire portion of the contract work represented by the five items on which overruns were experienced. To that base figure the contracting officer added allowances for overhead and profit, for both Western and its prime, the plaintiff, and thereby arrived at a total aggregate price for the five items in their entirety. He then, and still over objection, apportioned the total price figure among the five types of work in accordance with the proportion that the Government's prebid estimate of unit price for each bore to their sum. Finally, he developed a unit price within each category by simply dividing the total number of units involved into the aggregate price apportioned to the category. Without

[2] The Board record discloses, however, that at one time Western Waterproofing offered to accept a 15 percent discount of contract unit price on the excess units in order to terminate the entire controversy. The contracting officer rejected that compromise proposal.

conceding the overall propriety of this procedure, Western protested that the apportionment of lump-sum price among the five categories of work should at least be based on actual contract unit prices rather than on a prebid estimate that had proved to be drastically wide of the mark. The contracting officer agreed to that revision and on August 8, 1968 unilaterally issued a change order allowing $35,328.63 as compensation for the units of work performed in excess of 115 percent of the quantities specified by the contract. Had that excess been compensated at contract unit prices, plaintiff would have received $117,112.86—$81,784.23 more than allowed by the contracting officer. It is that differential for which the present suit is brought.

In resisting the contracting officer's demands for a downward revision of contract price for the excess work, plaintiff's primary reliance was on its interpretation of the ASPR provision that had superseded the one in force at the time that the subject contract was entered into—32 C.F.R. § 7.603.27 (1967), previously reproduced herein.

In 1968 the Regulations [8] were amended to require inclusion of the following clause "in [all] contracts containing estimated quantity items":

VARIATIONS IN ESTIMATED QUANTITIES
(APRIL 1968)

Where the quantity of a pay item in this contract is an estimated quantity and where the actual quantity of such pay item varies more than fifteen percent (15%) above or below the estimated quantity stated in this contract, an equitable adjustment in the contract price shall be made upon demand of either party. *The equitable adjustment shall be based upon any increase or decrease in costs due solely to the variation* above one hundred fifteen percent (115%) or below eighty-five percent (85%) of the estimated quantity. If the quantity variation is such as to cause an increase in the time necessary for completion, the Contracting Officer shall, upon receipt of a written request for an extension of time within ten (10) days from the beginning of such delay, or within such further period of time which may be granted by the Contracting Officer prior to the date of final settlement of the contract, ascertain the facts and make such

[8] 32 C.F.R. § 7.603-27 (1969).

adjustment for extending the completion date as in his judgment the findings justify. [Emphasis added.]

Plaintiff contended that in unambiguous terms the above provision specifically limited an equitable adjustment reducing the contract price on excess units to cost economies realized by the contractor solely on account of the volume increase represented by the additional quantities involved. In its situation, the plaintiff urged, there had been no realization of unit cost economies by reason of the increased volume of work.

By a letter of June 6, 1968 the contracting officer formally rejected the contention of plaintiff's attorney, Mr. Miller, outlined above. In pertinent part, the letter stated:

> Reference is made to our meeting on 29 May 1968 concerning price adjustment for the overrun quantities in excess of 115% of contract items 17 through 21 under subject contract.
>
> As agreed at the conclusion of said meeting, I have explored * * * Mr. Richard W. Miller's interpretation of the recently revised wording of the clause entitled "Variations In Estimated Quantities" which appears in Revision No. 27 of the Armed Services Procurement Regulation, 15 April 1968. * * *
>
> * * * * *
>
> The cover sheet of the ASPR Revision No. 27 clearly explains that the revised wording is merely to make more explicit that only the quantities which exceed 115%, or less than 85%, of the estimated quantities are subject to adjustment under the clause. *The revised wording adds no more to the intent of the clause than was always there.* Accordingly, I cannot agree with Mr. Miller's interpretation. [Emphasis added.]
>
> I have determined that $431.98 can be added to the allowable overhead as representing the interest heretofore excluded from overhead pool. This will raise the settlement figure to $35,308.22. A contract modification will be prepared as soon as practicable to provide for this amount and will be submitted to you for acceptance.

Two things are apparent from the foregoing. First, that in the view of the contracting officer the 1968 ASPR revision of the earlier provision, because of which the quantity variance clause was included in the subject contract, was intended to clarify, not to alter the meaning of the provision in force

when the contract was entered into. Second, he felt that, as clarified, the ASPR provision authorized an approach to the pricing of overrun quantities by reference not to a demonstrated differential between the cost of performing the overrun work and the estimated quantities of the same type work, but to an average cost of the entire work.

On October 29, 1968 the contracting officer issued his final decision rejecting plaintiff's exceptions to the equitable adjustment effected by his unilateral change order of the prior August 8.

Plaintiff timely appealed this decision and elected to proceed before the Board by way of a conference-type hearing in respect to which the evidentiary record was augmented solely by the addition, with the Government's affirmative acquiescence, of an affidavit by the vice president of Western Waterproofing who participated in the preparation of its bid to the plaintiff. 69–2 BCA at 36,836. While reversal of the Board's affirmance of the contracting officer is required on broader and more fundamental grounds, it should be noted that its treatment of the affidavit was seemingly incongruous in any case.

The affiant flatly declared that in assessing the work requirements for the job he concluded that there would be a quantity overrun in those items on which overruns actually occurred; that the extent of the actual overruns did not exceed that anticipated by him; and that the projected costs and unit prices bid by Western were predicated on the gross volume of work anticipated by him, *viz*, the contract quantities plus the anticipated overruns.

Though the Board received the affidavit into a record that by its account of the facts included no countervailing evidence whatever on the matters recited, it denied it evidentiary status by simply characterizing it as an unsupported allegation rather than admissible and probative proof. Thus, in the course of approving the adequacy of the contracting officer's equitable adjustment the Board observed (69–2 BCA at 36,836):

> * * * the Government's right to demand an equitable adjustment could [not] be defeated by the subcontractor's *allegation* that its prices to the prime were predi-

> cated on factors or quantities differing from those contained in the contract. However, *such an allegation, if proven*, might affect the amount of the equitable adjustment determined in response to either party's demand. [Emphasis added.]

In the circumstances of this case the affidavit was certainly not just an unsupported averment offered in the nature of an amended pleading. It was proffered and apparently received as evidence, relevant by the Board's own acknowledgment, that at least tended to prove [4] the proposition that the Board expressly conceded "might affect the amount of the equitable adjustment". There is not the slightest indication that the Board discounted the affidavit either because it found its factual purport to be inherently unbelievable or because it deemed that probative purport overcome by countervailing proof elsewhere in the record. The Government's effort on brief to invoke the latter thesis to justify the Board's action is totally unsupported by the Board's own words.

Of far more basic concern, however, is the fact that the Board shared the contracting officer's mistaken understanding of the effect of the variance clause when an overrun occurred. Thus, after observing that: "As written, the clause appears to contemplate a complete repricing of those contract items which vary from the estimated quantities by more than 15%",[5] the Board proceeded to evaluate the contracting officer's price determination from the standpoint of whether the contractor had shown an incurrence of costs greater than those reflected in the determination. Satisfied that such a showing had not been made, the Board approved the determination and further observed, in conclusion (69–2 BCA at 36,837):

> We have also analyzed the basis on which the Contracting Officer has determined the amount of the equitable adjustment and find the over-all adjustment, both in time [6] and money, constitutes an equitable adjustment which places the contractor in as favorable position

[4] *Maxwell Dynamometer Co.* v. *United States*, 181 Ct. Cl. 607, 631, 386 F. 2d 855, 870 (1967).

[5] 69–2 BCA at 38,836.

[6] The 12-day enlargement of performance time is inconsequential since, as previously noted, Western completed the entire job in one-ninth of the time originally allotted.

as he would have been, absent any overruns in the item quantities.

First, there is the incidence of the burden of persuasion. Both the contracting officer and the Board clearly imposed on the contractor the burden of affirmatively establishing the price to which it was entitled on the overrun quantities. Quite apart from questions going to the essentials of the pricing standard imposed by the relevant ASPR provision,[7] it is clear in any event that as the proponent of the equitable adjustment, it was the Government, not the contractor, on whom devolved the burden of proving the extent of any downward departure from the unit prices established by the contract for the items comprising the excess work. *Nager Electric Co.* v. *United States*, 194 Ct. Cl. 835, 853, 442 F. 2d 936, 946 (1971). The Board erred if, as its decision seems to indicate, it agreed with the contracting officer that it was up to the contractor to affirmatively justify the amount that it sought rather than up to the Government to prove why the amount paid should be less than that called for by the contract's unit prices.

Second, and more important, is the related question of the precise nature of the price readjustment standard on which the burden of proof is to operate in order to produce a proper end-result in the particular circumstances presented by this case.

As earlier noted, the contracting officer read the subject contract's quantity variance clause as calling for the repricing of excess quantities on the basis of the contractor's average actual cost of providing the entire quantities (both base and excess) of each of the items involved in the excess, plus an allowance for a "reasonable" profit thereon. It will be recalled that in rejecting the contractor's contention that the variance clause, as illuminated by the 1968 ASPR provision supplementing that in force at the inception of the contract, only authorized a deviation from contract unit prices to reflect differences in performance cost attributable to volume

[7] *G. L. Christian & Associates* v. *United States*, 160 Ct. Cl. 1, 11–12, 312 F. 2d 418, 424, *cert. denied*, 375 U.S. 954 (1963); *Winston Bros. Co.* v. *United States*, 198 Ct. Cl. 37, 44, 458 F. 2d 49, 52 (1972). Moreover, in the instant case both parties freely concede the governance of the ASPR provision in the application and interpretation of the quantity variance clause.

differential, the contracting officer stated that an examination of the history attending promulgation of the 1968 ASPR supplement had convinced him that: "The revised wording adds no more to the intent of the clause than was always there." The Board apparently agreed with the contracting officer's construction, for it stated (69–2 BCA at 36,836–37):

> As written, the clause appears to contemplate a complete repricing of those contract items which vary from the estimated quantities by more than 15%. A review of the history of the clause and its subsequent revision by ASPR Revision 27, dated 15 April 1968, *clarifies* the intent. * * * [Emphasis added.]

Neither party in the present proceeding has shed any further, much less different, light on the intended meaning of the ASPR provision, as supplemented, and independent research has failed to unearth any indication contrary to the construction placed on it by the contracting officer and the Board. Presumably the "history" referenced by the Board is that earlier noted by the contracting officer. Accordingly, for purposes of this decision, the language of the 1968 revision is accepted as a clarification of the meaning intended by the predecessor provision in force when the subject contract, with its quantity variance clause, was entered into. Viewing the 1968 ASPR provision as a clarification rather than a change, its subsequent effective date detracts not at all from its relevance to an interpretation of the antecedent clause in the subject contract. *Cf. Bethlehem Steel Corp.* v. *United States*, 191 Ct. Cl. 141, 423 F. 2d 300 (1970); *Hills Transportation Co.* v. *United States*, 204 Ct. Cl. 51, 492 F. 2d 1394 (1974).

In unqualified terms, the 1968 clarifying ASPR provision, *supra*, declares that "The equitable adjustment shall be based upon any increase or decrease in costs due solely to the variation above one hundred fifteen percent (115%) or below eighty-five percent (85%) of the estimated quantity." It is difficult to imagine definitive language that would more clearly convey an absolute limitation on the metes and bounds of inquiry in the determination of a departure from contract unit prices in the pricing of work outside the parameters of permissible variance. The language is fully as ex-

plicit in specifying the basis for any recasting of prices as it is in mathematically defining the volumetric prerequisite to any adjustment at all. Distinctly, the proponent of an adjustment is told that it will be confined in amount to such cost differentials as are directly attributable to a volume deviation greater than 15 percent from stated contract quantities. Applied in relevant context, an Armed Services Procurement Regulation has statutory status. *G. L. Christian & Associates* v. *United States*, 160 Ct. Cl. 1, 312 F. 2d 418, *cert. denied*, 375 U.S. 954 (1963); *Winston Bros. Co.* v. *United States*, 198 Ct. Cl. 37, 458 F. 2d 49 (1972). It is consequently appropriate, in the absence of exceptional circumstances not present here, to accord the language of such a regulation, just as a statute, its ordinary, everyday meaning. *Malat* v. *Riddell*, 383 U.S. 569, 571–72 (1966). *See also Hotpoint Co.* v. *United States*, 127 Ct. Cl. 402, 406, 117 F. Supp. 572, 574, *cert. denied*, 348 U.S. 820 (1954). When this is done it is simply not reasonably possible to conclude, as did the Board, that the implementary quantity variance clause of the subject contract "* * * contemplate[s] a complete repricing of those contract items which vary from the estimated quantities by more than 15%." Where, as here, the contract language (construed in harmony with the seminal ASPR) undertakes to specify the mode of adjustment, its command must be followed. *Rice* v. *United States*, 192 Ct. Cl. 903, 908–09, 428 F. 2d 1311, 1314 (1970).

On brief the Government attempts to justify the expansive construction embraced by the contracting officer and the Board as necessary to the discouragement of so-called "unbalanced bids" by contractors. Such a bid, it is explained, is one in which the contractor allocates a disproportionate share of indirect costs and anticipated profit to the unit prices bid for those items on which he anticipates an overrun; the object being to reap overgenerous profits should the anticipated overruns materialize. While in the abstract this suggestion has considerable logical appeal, the difficulty with its application to the present controversy is that, in addition to the contradictory purport of the language employed in the governing regulation, there is not a shred of evidence in the record manifesting its involvement in any event. The

burden of the argument is therefore more appropriately directed to those officials charged with responsibility for formulating procurement policy and effectuating it by adoption of appropriate contract language and regulations. Should those officials conclude that neutralization of the vice of unbalanced bids can best be accomplished by the de novo repricing of excess or short-fall procurement under an estimated quantity contract, they can readily adopt language to that end. *Pacific Architects & Engineers Inc.* v. *United States*, 203 Ct. Cl. 499, 491 F. 2d 734 (1974). To date, this has apparently not been done. For this court, in the name of "interpretation", to undertake the implementation of a totally unarticulated procurement policy, however worthy, would amount to an impermissible overreaching of its legitimate role.

To secure a reduction in contract unit price for those quantities in excess of 115 percent of estimate, the Government was required in this instance to demonstrate by a preponderance of the evidence that the reduction sought represented a "decrease in costs due solely to the variation above 115% * * * of the estimated quantity". To say nothing of a preponderance, the present record contains no evidence whatever indicating the realization of cost economies attributable to excess volume. Plaintiff is therefore entitled to recover on behalf of its subcontractor, Western Waterproofing.

CONCLUSION

For the reasons given, defendant's motion for summary judgment is denied, plaintiff's motion for summary judgment is granted, and judgment entered for plaintiff in the amount of $81,784.23.

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512 F. 2d 1104

DONALD R. GRATEHOUSE v. THE UNITED STATES

[No. 328–73. Decided March 19, 1975]

ON PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

Civilian pay; resignation; claim of procedural violation; agency hearing; remand to Civil Service Commission re claim of coerced

Syllabus

resignation.—Plaintiff, a former career Government employee with the Department of Housing and Urban Development (HUD), seeks back pay and reinstatement to his position by reason of an alleged procedural error of the Civil Service Commission in failing to consider and decide his claim that his resignation was coerced. Defendant argues that such claim is an afterthought, that plaintiff did not raise the issue before the effective date of his resignation and therefore the agency and CSC did not consider it and violated no adverse action procedures. Plaintiff was notified on March 19, 1971 that his job performance for the past 3 years was unsatisfactory, that an in-grade salary merit increase scheduled for June 3, 1971 was being indefinitely withheld and that his work was not of a caliber to merit continued employment. Concerned that the denial of the in-grade salary increase would be a blot on his personnel record and reduce opportunities for future employment, plaintiff submitted his resignation dated May 20, 1971, effective September 4, 1971 in exchange for receiving an in-grade pay increase. On September 2, 1971 plaintiff requested return of his resignation and charged that the resignation was induced by defendant's "illicit actions" and "bad faith." The request was denied. On plaintiff's appeal to CSC alleging, for the first time explicitly, that his resignation was involuntary within the meaning of ch. 752 of the Federal Personnel Manual, the CSC Appeals Examining Office ruled that HUD had not stated a valid reason for denying the withdrawal pursuant to FPM ch. 715, subch. 2–3, that plaintiff's separation was, therefore, an adverse action subject to 5 C.F.R. Part 752–8 (1972), and that the applicable regulation had not been followed, and recommended that plaintiff be restored to his position retroactive to September 4, no ruling being given on the merits of the reasons for the removal or on the claim of forced resignation. HUD appealed to CSC Board of Appeals and Review (BAR), asserting that it had valid reasons for refusing to permit withdrawal of the resignation, that the resignation was voluntary, that plaintiff's position had been eliminated, that he had been replaced by another with a lower rating, and that returning the resignation would have created administrative disruption (a valid reason under CSC regulations and FPM, ch. 715, subch. 2–3). In reversing the first decision and finding that HUD's reasons for refusing to permit withdrawal of the resignation were within required guidelines and valid, the BAR did not directly address the involuntary resignation allegation of plaintiff's appeal. Plaintiff now says that this was a procedural violation of adverse action regulations entitling him to back pay and reinstatement regardless of the merits of his claim of coercion and deception, and raises, for the first time, his right to a hearing by CSC on his charge. After the present action was filed defendant's counsel offered plaintiff a hearing before the CSC which was to have retroactive effect, i.e. an adverse decision on the duress question would preclude recovery of back pay; plaintiff refused the offer. Since plaintiff's motion for summary judgment is

Syllabus

limited to his rights by reason of CSC's failure to accord him his procedural rights to a prompt hearing on the merits of his allegation that his resignation was void and illegal because obtained by duress, the opinion is limited to this issue. The court recites the numerous procedural blunders committed by both parties. It is *held* (1) that defendant's offer of a CSC hearing was too late to qualify as reconsideration, and plaintiff was justified in refusing the offer; (2) that under the circumstances here the agency did not violate regulations by not affording plaintiff a prompt hearing on his claim of forced resignation since he did not raise the charge before the agency nor explain failure to do so, nor has he shown demonstrable prejudice to support the charge; and (3) that since the issue of the voluntariness of the resignation is a disputed fact which cannot be resolved on the motions for summary judgment, the court remands the case to the Civil Service Commission for a hearing on the coercion charge. Further proceedings are suspended for 6 months. The motions are allowed and denied consistent wtih the opinion.

Civilian pay; adverse action; resignation, involuntary.

[1] A Government employee's involuntary resignation constitutes an adverse action by the employing agency, and where there is a non-frivolous allegation by the employee that his resignation was involuntary, he is entitled, in the usual case, upon timely appeal to the Civil Service Commission, to a hearing before that body.

Officers ⇐ 72(2)

Civilian pay; adverse personnel action; procedural violation.

[2] Where it is found that an adverse personnel action has been carried out in substantial violation of procedural regulation, it is a void action and the employee is entitled to recover any pay of which he has been illegally deprived. Exceptions are made to this rule where the procedural error is deemed harmless.

United States ⇐ 39(8)

Administrative practice and procedure; reconsideration or rehearing; right of tribunal reconsideration.

[3] Pursuant to 5 C.F.R. § 772.308 (1972), a Government employee may request reconsideration of a Civil Service Commission decision on his appeal where he believes that a procedural or substantive error has been made, but, having failed to exhaust his opportunity to gain such reconsideration at the administrative level, absent extenuating circumstances it is unjust to keep silent and many months or even years later in a lawsuit make the point while back pay has been allowed to accumulate.

Officers ⇐ 72(2)

Administrative practice and procedure; reconsideration or rehearing; right of tribunal reconsideration.

[4] An administrative tribunal has the inherent power to reconsider and change a decision if it does so within a reasonable period of time.

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What is a reasonable time period will vary with each case, but absent unusual circumstances, the time period should be measured in weeks, not years.

Administrative Law and Procedure ⇐ 483

Administrative practice and procedure; reconsideration or rehearing; right of tribunal reconsideration; retroactive effect.

[5] Correction by an administrative tribunal of a prejudicial procedural error within a reasonable time period will have retroactive effect, or, in other words, will preclude any cause of action based on the original error.

Administrative Law and Procedure ⇐ 498

Administrative practice and procedure; reconsideration or rehearing; right of tribunal reconsideration.

[6] Where a prejudicial procedural error has been committed, and a reasonable time for reconsideration has run, the purpose of an administrative correction of that error can only be to determine the merits of the dispute *prospectively*. Thus, where defendant's offer of a Civil Service Commission hearing on plaintiff's charge that his resignation was involuntary due to intimidation and deception was made 2 years after a hearing could have been held, the offer was too late to qualify as reconsideration, and plaintiff was justified in refusing the offer once he ascertained that any decision arising out of that hearing was to have retroactive effect.

Officers ⇐ 72(1)

Civilian pay; claim for back pay; procedural violation; offer to correct; period of recovery.

[7] Where an employee in an adverse personnel action charges the Government with prejudicial procedural violation and the latter offers in writing to correct the alleged procedural shortcomings which will have prospective effect only, refusal of the offer limits the employee's period of recovery of back pay to the date of the offer.

United States ⇐ 39(8)

Civilian pay; resignation; claim of coercion; pleading of.

[8] Applicable regulations do not require a federal employee to first raise the issue of coerced resignation before his department before a timely appeal of the issue to the Civil Service Commission.

Officers ⇐ 72(2)

Civilian pay; hearing; agency level hearing; right to hearing.

[9] Where plaintiff was aware that he could have claimed before his department that he was the victim of an adverse action, i.e., alleged coerced resignation, as to which a hearing could have been had, but he offered no explanation why he did not raise the charge of coercion and instead elected to go to the Civil Service Commission at a time when he was no longer a Government employee, absent proof of agency violation of regulations prior to departure of plaintiff from Government service, and absent proof of demonstrable prejudice to

plaintiff, plaintiff's failure to receive a timely hearing on a charge he did not raise, if an error, was a harmless one.

United States ⇐ 39(8)

Pleading and practice; summary judgment; when appropriate.

[10] Where plaintiff's claim for back pay and reinstatement to his position has created a genuine issue of disputed fact as to the voluntariness of his resignation, resolution of the issue on cross-motions for summary judgment is precluded.

Courts ⇐ 470

Pleading and practice; remand to Civil Service Commission.

[11] Where the court on cross-motions for summary judgment has concluded that plaintiff's claim for back pay and reinstatement to his position has created an issue of disputed fact as to whether plaintiff's resignation was induced by defendant's coercion, it is proper that the issue be resolved in the first instance by the Civil Service Commission on remand by the court.

Courts ⇐ 470

Civilian pay; recovery, measure of.

[12] If plaintiff sustains his claim on remand to the Civil Service Commission for resolution of the disputed fact as to the voluntariness of plaintiff's resignation, he will have established the prejudice he has suffered by reason of the adverse action, and will have to be made whole for it by defendant from the date of his illegal separation, with appropriate offsets required by law.

United States ⇐ 39(8)

Ben Paul Noble, attorney of record, for plaintiff. *Noble, Mann and Schoenfeld*, of counsel.

Frank H. Clabaugh, with whom was *Assistant Attorney General Carla A. Hills*, for defendant.

Before COWEN, *Chief Judge*, SKELTON, and BENNETT, *Judges*.

BENNETT, *Judge*, delivered the opinion of the court:

Plaintiff seeks back pay and reinstatement to his position by reason of an alleged procedural error on the part of the Civil Service Commission (CSC) in failing to consider and decide plaintiff's claim that his resignation from departmental employment was coerced. Defendant argues that the claim of duress is simply an afterthought of plaintiff's, that he did not even raise the issue before the effective date of his resignation, and that, therefore, the agency and the CSC

did not consider it and violated no adverse action procedures, as alleged by plaintiff. Defendant asks that we dismiss the claim or remand it to the CSC for a hearing on the merits of the allegation of resignation induced by coercion.

We conclude upon a consideration of the briefs, including supplemental briefs requested by the court, and upon oral argument, for reasons hereafter stated, that plaintiff is not presently entitled to back pay or reinstatement. However, pursuant to Pub. L. 92–415, 86 Stat. 652 (1972), we remand to the CSC for a hearing on the merits of plaintiff's claim of coerced resignation.

Until his separation on September 4, 1971, plaintiff was a career Government employee (economist, GS–13, step 4) with the Department of Housing and Urban Development. On March 19, 1971, plaintiff's supervisor informed him in detail, by letter, that plaintiff's job performance for the past 3 years was unsatisfactory, that as a consequence an in-grade salary merit increase scheduled for June 3, 1971, was being "indefinitely withheld," and that plaintiff's work was "not of a caliber to merit continued employment." Following receipt of this letter, plaintiff met with the Deputy Under Secretary, who, after hearing plaintiff's response, advised him that he might consider seeking other employment. Subsequent efforts to secure other employment were, however, unsuccessful.

A very real concern for plaintiff during this period was that the denial of the in-grade salary increase would be a blot on his personnel record and reduce opportunities for future employment. As a result of this concern, plaintiff agreed to submit his resignation—dated May 20, 1971, though not effective until September 4 of that year—in return for his receiving the in-grade increase. This arrangement appears to have been at plaintiff's suggestion.

On September 2, 1971, 2 days before the effective date of his resignation, plaintiff submitted a letter dated September 1 to his supervisor. The letter requested the immediate return of his resignation, and charged for the first time that the resignation had been the product of unspecified "illicit actions" and "bad faith" on defendant's part. At a meeting of plaintiff and HUD personnel on the same day, his request

for withdrawal of resignation was denied. However, plaintiff was offered a 60-day temporary appointment in order to give him more time to find another position. Plaintiff rejected the offer and he was separated on September 4, the effective date of his resignation.

Plaintiff timely appealed his separation to the CSC on September 15, 1971, alleging, for the first time explicitly, that his resignation was involuntary within the meaning of chapter 752 of the Federal Personnel Manual.[1] Specifically, he alleged deception, intimidation, time pressure, and duress. In reply, the agency argued that the resignation was voluntary and that it had a valid reason for refusing plaintiff's requested withdrawal of the resignation. The chief of the CSC Appeals Examining Office, noting that pursuant to FPM chapter 715, subchapter 2–3, the agency was required to "have a valid reason for denying the withdrawal," ruled on November 4, 1971, that HUD had not stated a valid reason or communicated one to plaintiff, that his separation was therefore an adverse action, subject to 5 C.F.R. Part 752–B (1972), and that the regulations pertaining to such action had not been followed. It was recommended that plaintiff be restored to his position retroactive to September 4. The Appeals Examining Office stated that it was ruling only that there had been a procedural deficiency and that the decision "does not constitute any ruling on the merits or sufficiency of the reasons the Department may have for removing Mr. Gratehouse from the service." We note also that the decision made no reference to plaintiff's claim that his resignation was involuntary from its inception.

HUD promptly appealed the foregoing decision to the CSC's Board of Appeals and Review (BAR). HUD's letter of appeal asserted that the agency had valid reasons for refusing to permit the withdrawal of plaintiff's resignation and reiterated that the May 20, 1971 resignation was entirely voluntary. HUD alleged, among the grounds for its action, that plaintiff's position had been eliminated and that he had

[1] FPM Supp. 752–1, § S1–2a(1) (1972), states, in pertinent part:
"• • • [A] normally voluntary action—i.e., a resignation, optional retirement, or reduction in rank or pay at the employee's request—is an adverse action if it is obtained by duress, time pressure, intimidation, or deception. • • •."

been replaced by another person with a GS–9 rating. Returning plaintiff's resignation would thus have created administrative disruption, in HUD's opinion. Such disruption and reassignment was sufficient to support HUD's actions pursuant to CSC regulations and chapter 715, subchapter 2–3, of the Federal Personnel Manual (June 21, 1971):

> * * * When the agency does not permit an employee to withdraw his resignation before its effective date, the agency must have a valid reason for denying the withdrawal. Among the reasons that would be valid are a showing that it would cause administrative disruption or that the job has been committed to someone else. A desire to avoid taking adverse action would not be a valid reason for denying the withdrawal. Whatever the reason, it must be explained to the employee. * * *.

Plaintiff contested HUD's assertions.

In its decision of May 5, 1972, the Board of Appeals and Review reversed the Appeals Examining Office, finding that HUD's stated reasons for refusal to permit withdrawal of the resignation were within required guidelines and valid. Plaintiff's resignation, the board stated, "properly became effective on September 4, 1971." Thus, the board did not directly address the allegation in plaintiff's appeal that his resignation was involuntary due to intimidation and deception. This, plaintiff now says, was a procedural violation of adverse action regulations contained in 5 C.F.R. Part 752 (1972), entitling him to back pay and reinstatement regardless of the merits of his claim of coercion and deception. He says that he was entitled to a hearing by the CSC on his charge. Plaintiff raises his right to a hearing for the first time in this pending motion. He did not complain to the CSC about its failure to accord him any procedural rights nor that it had failed to speak to his charge of involuntary resignation. Plaintiff's petition to the court was filed on August 23, 1973. It was amended on April 4, 1974.[2] Plaintiff's motion for summary judgment was filed on July 3, 1974.

[2] Plaintiff's first amended petition charges that he was separated on the basis of agency action alleged to be arbitrary and capricious and in violation of agency law and regulation. Plaintiff's motion for summary judgment is limited, however, to the rights of plaintiff by reason of failure of CSC to accord him his procedural rights to a hearing on the merits of the allegation that his resignation was void and illegal because obtained by duress. This opinion is limited to this issue raised by the motion.

It is now hornbook law in our jurisdiction that an involuntary resignation constitutes an adverse action by the agency. FPM Supp. 752–1, § S1–2a(1); *McCormack* v. *United States*, 204 Ct. Cl. 371 (1974); *Cosby* v. *United States*, 189 Ct. Cl. 528, 417 F. 2d 1345 (1969). Where there is a nonfrivolous allegation by a Government employee that his resignation was involuntary, he is entitled, in the usual case, upon timely appeal to CSC, to a hearing before that body. 5 C.F.R. Parts 752, 772 (1972); *Goodman* v. *United States*, 358 F. 2d 532 (D.C. Cir. 1966); *Dabney* v. *Freeman*, 358 F. 2d 533 (D.C. Cir. 1965); *McCormack* v. *United States*, *supra*; *Cunningham* v. *United States*, 191 Ct. Cl. 471, 423 F. 2d 1379 (1970). Where it is found that an adverse personnel action has been carried out in substantial violation of procedural regulation, it is a void action and the employee is entitled to recover any pay of which he has been illegally deprived. *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959); *Service* v. *Dulles*, 354 U.S. 363 (1957); *Leone* v. *United States*, 204 Ct. Cl. 334 (1974); *Jones* v. *United States*, 203 Ct. Cl. 544 (1974); *Hanifan* v. *United States*, 173 Ct. Cl. 1053, 354 F. 2d 358 (1965). Exceptions are made to the rule where the procedural error is deemed harmless.[3]

Against the background of these general rules we have the facts of this case illustrating abundant procedural blunders by both sides, sufficient to mislead both. As to plaintiff, he never argued to his department that his resignation was being coerced. He only requested, over 3 months after he submitted his resignation, and 2 days before it was to become effective, that he be permitted to withdraw it. Until plaintiff appealed to the CSC there was no reason to believe that plaintiff viewed his resignation as involuntary. His memorandum of appeal to the CSC spoke of coercion for the first time and referred to FPM chapter 752. At that point the

[3] *Haynes* v. *United States*, 190 Ct. Cl. 9, 418 F. 2d 1380 (1969); *McCallin* v. *United States*, 180 Ct. Cl. 220 (1967); *Creamer* v. *United States*, 174 Ct. Cl. 408, *cert. denied*, 385 U.S. 819 (1966); *Greenway* v. *United States*, 163 Ct. Cl. 72, 80 (1963), 175 Ct. Cl. 350, *cert. denied*, 385 U.S. 881 (1966). A prejudicial procedural error is not rendered harmless, however, because the merits of the dispute appear to be clearly against the employee. *Bell* v. *United States*, 366 U.S. 393 (1961); *Hanifan* v. *United States*, 173 Ct. Cl. 1053, 354 F. 2d 358 (1965); *Garrott* v. *United States*, 169 Ct. Cl. 186, 340 F. 2d 615 (1965).

CSC Appeals Examining Office focused on the requirement of FPM chapter 715 that an agency must have a valid reason for refusing to permit withdrawal of a resignation. In reviewing the action of the Appeals Examining Office the BAR apparently never realized that plaintiff had made a claim of involuntary resignation, for it focused entirely on the issue of whether or not the decision of the Appeals Examining Office was sustainable. This oversight is not difficult to understand in the context of events leading to the resignation and the demand for its withdrawal, for until *after* plaintiff left the Government payroll there was no issue about an involuntary resignation.

When the BAR decision came down, it should have been instantly clear to plaintiff that the BAR had failed to consider what plaintiff now says is his primary claim—coercion. Yet, he made no attempt to bring the oversight to the BAR's attention. 5 C.F.R. § 772.308 (1972) provides that a party may request reconsideration of a decision where it is believed that a procedural or substantive error has been made. Plaintiff did not exhaust his opportunity to gain such reconsideration at the administrative level. If an employee sincerely feels that there has been an oversight of this kind on his appeal, yet he does not say anything about it or use the regulations designed to correct such error, questions arise as to the fairness of his failure to do so. It is unjust to keep silent and many months or even years later in a lawsuit make the point while back pay has been allowed to accumulate. We do not impute improper motives to plaintiff here but, of course, the result of what he did is the same as if he had acted deliberately to capitalize on a technical oversight to maximize his claimed damages. On the other hand, the board's decision stated that "there is no further right of administrative appeal." Plaintiff might fairly have assumed from this that he had no opportunity for reconsideration. As we have said, both sides contributed to this confusion and must share the responsibility for failure of the CSC to render a decision on the coercion issue. But, the comedy of errors does not end here.

At some time before plaintiff's motion for summary judgment was filed on July 3, 1974, counsel for defendant in a

telephone conversation offered plaintiff a hearing before the CSC. Defendant's attorney emphasized in oral argument that the offer of a hearing was made as a matter of "grace," not as an admission of any prior procedural error. He also stated that the hearing was to have retroactive effect, *i.e.*, a decision against plaintiff on the duress question would preclude any recovery of back pay by plaintiff. The plaintiff refused the offer.

The consequences of a refusal to accept an agency's offer to remedy a possible, though disputed, procedural error will depend on the timing and nature of the offer. We have many times held that an agency has the inherent power to reconsider and change a decision if it does so within a reasonable period of time. Recently, in fact, we applied this rule specifically to the CSC. *Bookman* v. *United States*, 197 Ct. Cl. 108, 453 F. 2d 1263 (1972). In *Bookman* we noted at 111 (453 F. 2d at 1265) that "reconsideration is often the sole means of correcting errors of procedure or substance." We stated further:

> * * * this court will sustain the reconsidered decision of an agency, as long as the administrative action is conducted within a short and reasonable time period. * * *. [197 Ct. Cl. at 112–13, 453 F. 2d at 1265.]

What is a short and reasonable time period will vary with each case, but absent unusual circumstances, the time period would be measured in weeks, not years. A correction of an error within a reasonable time period will have retroactive effect, or, in other words, will preclude any cause of action based on the original error.

Where reasonable time for reconsideration has expired, there is no longer an opportunity to correct the procedural error retroactively. *Vitarelli* v. *Seaton*, *supra; Manzi* v. *United States*, 198 Ct. Cl. 489 (1972); *Hanifan* v. *United States*, *supra*. This is true because, generally speaking, separation of an employee in violation of procedural regulations is illegal and void, except where it is harmless error. The employee in effect was never separated, and never stopped drawing his pay. *Service* v. *Dulles*, *supra; Jones* v. *United States*, *supra*. In sum, where a prejudicial procedural error has been committed, and a reasonable time for reconsideration has

run, the purpose of a correction of that error can only be to determine the merits of the dispute *prospectively*.

In the instant case, defendant's offer of a CSC hearing 2 years after a hearing could have been held was far too late to qualify as reconsideration. Thus, plaintiff was entirely justified in refusing the offer, once it was ascertained that any decision arising out of that hearing was to have retroactive effect. Had he accepted such an offer, plaintiff would have waived any right he might have had under different circumstances to recover back pay as a result of the alleged faulty procedure.[4]

We come down now to the two central issues of the case—did defendant violate its regulations by not affording plaintiff a prompt hearing on his claim of forced resignation made after the effective date of that resignation? And, can we, as plaintiff insists, find for plaintiff on the merits of his claim that his resignation was forced?

As to the first point, it is plaintiff's position that regardless of when he charged coercion, defendant committed a breach of regulations since it did not afford him a hearing on his charge. He says that such a violation entitles him to back pay regardless of the merits of his claim of coercion. We note that plaintiff's appeal to CSC was within 15 days after the effective date of his resignation and that he therein asserted facts as to coercion which, standing alone, entitled him to adverse action procedures, including a hearing by CSC. As we have said, it is defendant's failure to accord plaintiff such a hearing that gives rise to the back pay claim. It is clear to the court from the supplemental briefs and exhibits that there was no requirement by regulation that plaintiff must first raise the issue of coerced resignation before his department before going to CSC about it, assuming timely appeal to CSC, as here. It is equally clear from regulations set forth

[4] On the other hand, we do not believe that the Government is helpless to prevent the continuing cumulation of back pay during litigation where the Government is charged with violation of procedural regulations. If defendant offers, in writing, to correct the procedural shortcomings alleged by an employee, which will have prospective effect only, then a refusal of that offer by a plaintiff would, we think, limit his period of recovery to the date of that offer. Whether such an offer is or is not accepted, defendant may continue its defense in this court of the procedures employed in the initial decision. If a stay of proceedings in this court were required while the corrected procedures went forward, it would be freely given in appropriate circumstances.

in the HUD Handbook, § 771.3, Adverse Actions and Appeals, which plaintiff admits he had access to and knew about, that plaintiff could have claimed before his department that he was the victim of an adverse action and that he would have obtained a hearing on the charge. But, he elected to go to CSC.

Plaintiff's claim suffers from the disability that his separation was not the result of a violation of procedural regulations by his agency. Any such violation came only after he was no longer a Government employee and on a charge of such violation raised at that time. This plainly served to confuse defendant as to what plaintiff's real claim was, and plaintiff cannot escape responsibility for contributing to that confusion and for his failure even to call to the attention of the BAR his charge, first made in court, that it had committed what he believed to be procedural error. The standard rules heretofore referred to thus do not fairly fit the facts of this case. Additionally, plaintiff gives us no reason whatever for his failure to raise the coercion issue before he went off the payroll. If he believed he was coerced, he had several months to claim it before his resignation became effective. There is no reason to assume that had plaintiff thus exhausted his administrative remedy in the regular way he would not have been accorded all procedural rights. Plaintiff knew what his rights were all along, unlike in *McCormack* v. *United States*, *supra*.

In these circumstances, therefore, where plaintiff bears a heavy responsibility for his failure to receive a timely hearing on a charge he did not raise, and does not explain why he did not raise it while in defendant's employment, and where no regulations are proven to have been violated prior to his leaving that employment, we think it is harmless error if there is any error, and that the rule reiterated most recently in *Hart* v. *United States*, 204 Ct. Cl. 925, *cert. denied*, 419 U.S. 1049 (1974), should apply:

> * * * In *Cohen* v. *United States*, 177 Ct. Cl. 599, 369 F. 2d 976 (1966), *cert. denied*, 387 U.S. 917 (1967), this court held that a plaintiff is required to show "demonstrable prejudice" to support a charge of procedural error. We see no such prejudice in this case. * * *. In fact, any financial prejudice involved could be remedied,

> if a claim could be made out, by administrative action or under the Back Pay Act, 5 U.S.C. § 5596 (1970) * * *.

We would only add that any other rule would put a premium on form rather than substance and permit a plaintiff to recover for technical rule infractions without demonstrated prejudice flowing therefrom. We decline to recognize such a result as in the interests of proper administration of justice. Fortunately, under our procedures and jurisdiction there is a way to get directly to the merits of a serious charge such as plaintiff raises here. We turn, therefore, to plaintiff's claim which the CSC did not face—was plaintiff's resignation induced by coercion of defendant?

Plaintiff's claim for back pay and reinstatement to his position, from which he claimed he was neither legally removed nor legally resigned, cannot be determined without a hearing on the merits of his allegations that the resignation was improperly induced by defendant. This is an issue of disputed fact that cannot be resolved on these pending motions. *Paroczay* v. *Hodges*, 297 F. 2d 439 (D.C. Cir. 1961). Plaintiff claims that he was tricked and deceived, pressured and intimidated. Defendant says that the claim is in bad faith because defendant at the departmental level addressed and repudiated all charges made by plaintiff concerning refusal of his attempt to withdraw the resignation and that these charges were dismissed by the CSC as well. Defendant says that the claim of a coerced resignation is pure afterthought since it was not raised before HUD although there was ample opportunity to do so, that it was not raised even with the CSC until about 4 months after the resignation was submitted to HUD by plaintiff, and that the issue was not raised at all until after plaintiff's resignation had become effective. Defendant would have us conclude from all this that plaintiff has created a lawsuit by his own failures on the job and that these failures led to plaintiff's offer to resign in order to get the step pay increase. But, we do not know and can conclude nothing from the motion papers about the quality of plaintiff's work. Defendant also says that the claim is an afterthought because plaintiff could not find another job although he conducted a long search made possible by his

selecting a delayed date for his resignation to go into effect. Defendant offered plaintiff still additional time to job-hunt but it was refused. Defendant charges that plaintiff actually sought an extension of the resignation date shortly before he raised the coercion issue. Defendant concludes that this case is just an effort by plaintiff to reap a windfall for the consequences of his failure to perform on the job and that, in any event, he cannot be reinstated to a position that was abolished.

These contentions, of course, all require proof. As in *McCormack* v. *United States*, *supra*, *Goodman* v. *United States*, *supra*, and *Dabney* v. *United States*, *supra*, it is proper that this issue of whether the resignation was in fact voluntary be decided in the first instance by the Civil Service Commission to which it is remanded for hearing and decision. If plaintiff wishes to pursue the matter further he has the burden of proving that his resignation was not voluntary. *Leone* v. *United States*, *supra*. The criteria for deciding the issue are set forth fully in the CSC regulations, Federal Personnel Manual, and in decided cases. *Pitt* v. *United States*, 190 Ct. Cl. 506, 420 F. 2d 1028 (1970); *Dabney* v. *Freeman*, *supra*; *Fruhauf Southwest Garment Co.* v. *United States*, 126 Ct. Cl. 51, 62, 111 F. Supp. 945, 951 (1953).

If defendant made a mistake for which plaintiff must be compensated, it will not be because under the facts we have on the motions defendant can fairly be charged with violating regulations. It is not necessary to find such violation now for plaintiff to recover, however, if he can establish the truth of his claim of coercion. If through defendant's oversight in not addressing one issue in plaintiff's appeal to CSC, delay has been occasioned as to a hearing which might have been afforded sooner, it is not plaintiff who will lose thereby. If back pay is due because plaintiff sustains his claim, he will have established the prejudice he has suffered and will have to be made whole for it by defendant, back to September 4, 1971, with appropriate offsets required by law. *Ainsworth* v. *United States*, 185 Ct. Cl. 110, 399 F. 2d 176 (1968); Back Pay Act of 1966, 5 U.S.C. § 5596 (1970), 80 Stat. 94.

Pursuant to our authority by rule and the remand statute, 28 U.S.C. § 1491 as amended by Pub. L. 92–415, 86 Stat. 652

Syllabus

(1972), the case is remanded to the Civil Service Commission for a hearing on plaintiff's charge of resignation induced by defendant's coercion. Further proceedings in court are suspended for a period of 6 months from this date. Plaintiff's counsel is designated to advise the court by letter to the trial judge of the status of the remand proceedings pursuant to Rule 149(f). Attention of counsel and the Commission is also directed to Rule 150. The motion for summary judgment and cross-motion for summary judgment are allowed and denied consistent with this opinion.

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513 F. 2d 1360

ROY C. HOPKINS v. THE UNITED STATES

[No. 342-72. Decided March 19, 1975]*

ON DEFENDANT'S MOTION TO DISMISS PETITION

Court of Claims jurisdiction; claim against nonappropriated fund instrumentality; post exchanges; discharged civilian employee.— Plaintiff was discharged in 1968 from his position as a civilian employee of the Army and Air Force Exchange Service (AAFES), a nonappropriated fund instrumentality. Plaintiff seeks to recover back pay and appropriate allowances for the period following his alleged improper discharge, claiming that his separation was arbitrary and capricious, a breach of his contract of employment and was in violation of due process and of prescribed regulations and procedures. Defendant has moved to dismiss the petition on the procedural ground that the petition does not state a claim within this court's jurisdiction. While post exchanges have been held to be arms of the Government deemed by it essential for performance of governmental functions and are integral parts of the military departments, prior to enactment of Pub. L. 91-350 (1970), no act of Congress had waived sovereign immunity with respect to contracts of nonappropriated fund activities, nor had this court held that employees of such agencies qualify as Federal employees. In asserting that exchange employees are not Federal employees, plaintiff argues that his relationship with AAFES was contractual, the same as employees in the private sector, and that Congress in enacting Pub. L. 91-350 intended to afford exchange employees relief. Defendant argues (a) that exchange personnel serve by appointment rather than by contract, and (b) that Congress' failure to expressly include exchange personnel is evidence of lack of intent to waive sovereign immunity in the instant case. The court *reaffirms* and *holds* that an employee of the exchange

*Defendant's *petition for certiorari granted* October 6, 1975.

Syllabus

service is not an employee of the United States, and *holds* that defendant's assertion (a) is accordingly unfounded. The court also *holds* that plaintiff's employment arises from either an express or implied contract. The court also *holds* that the intent of Congress was to correct the harsh results judicially imposed theretofore affecting exchange employees. The court differs with the recent holding in *Young* v. *United States*, 498 F. 2d 1211 (5th Cir. 1974), and *holds* that this court has jurisdiction to grant a money judgment against the United States for alleged improper discharge of an employee of a nonappropriated fund exchange-type instrumentality. Defendant's motion to dismiss is denied, and the case is remanded to the trial division for decision on the merits.

Claims against the United States; sovereign immunity.

[1] The doctrine of sovereign immunity precludes suits against the Federal Government unless such immunity has been specifically waived by an act of Congress. In this court, under the Tucker Act, 28 U.S.C. § 1491, only suits against the United States are permitted, and thus the court's jurisdiction exists only where such immunity has been waived.

United States ⇐ 125(3)
Courts ⇐ 449(1)

Court of Claims jurisdiction; nonappropriated fund instrumentality; post exchanges.

[2] While this court recognized a lack of jurisdiction over claims against nonappropriated fund activities, it also recognized the harshness of the result which effectively precluded alleged injured plaintiffs from obtaining a forum in which the merits of their claims could be aired. It was within this setting that Congress, in 1970, enacted Pub. L. 91-350 amending the Tucker Act in order to remove the sovereign immunity of the United States with respect to contracts of post exchange operations conducted within the military and the National Aeronautics and Space Administration.

United States ⇐ 125(5)

Civilian pay; appointment and tenure; generally.

[3] The basis for the rationale that a civilian Federal employee is in an "appointed" rather than a "contractual" status is that the Government must have the power to change the agents who carry out the public duties, as well as the terms under which they work.

United States ⇐ 36

Civilian pay; nonappropriated fund instrumentality; post exchange employees; status.

[4] An employee of the post exchange service is not an employee of the United States. *Keetz* v. *United States*, 168 Ct. Cl. 205 (1964).

Armed Services ⇐ 27

Civilian pay; nonappropriated fund instrumentality; post exchange employee; status.

[5] The employment status of non-Federal employees is governed by

the same rules of law applicable to private employer-employee relationships. Such a relationship is contractual in nature, either express or implied. Since an employee of a post exchange service has been held not to be an employee of the United States, his employment arises from either an express or implied contract.

Armed Services ⇐ 27

Claims against the United States; nonappropriated fund instrumentality; congressional intent; post exchange employees.

[6] While waivers of sovereign immunity are to be strictly and conservatively construed, and while there is no specific reference in the legislative history of Pub. L. 91–350 to a waiver of immunity against suits by exchange employees, in view of the reference in the history to a desire to remove "loopholes" and to the harsh results mentioned in certain of this court's opinions relating to claims for pay or personal services of post exchange employees, correction of the judicially imposed harsh results was clearly within the intent of Pub. L. 91–350.

United States ⇐ 125(9)

Court of Claims jurisdiction; nonappropriated fund instrumentality; post exchange employees.

[7] This court has jurisdiction to grant a money judgment against the United States for an alleged improper discharge of an employee of a nonappropriated fund exchange-type instrumentality.

Courts ⇐ 449(1)

Thomas H. McGrail, attorney of record for plaintiff.

Thomas W. Petersen, with whom was *Acting Assistant Attorney General Irving Jaffe*, for defendant.

Before COWEN, *Chief Judge*, DAVIS, SKELTON, NICHOLS, KASHIWA, KUNZIG, and BENNETT, *Judges*.

KUNZIG, *Judge*, delivered the opinion of the court:

The issue presented in this case of first impression is whether we have jurisdiction to grant a money judgment against the United States for an alleged improper discharge of an employee by a nonappropriated fund instrumentality of the United States. We hold that the 1970 amendment to the Tucker Act (Pub. L. 91–350) confers jurisdiction on this court over the claim asserted by plaintiff.

Plaintiff was discharged on August 6, 1968 from his position as a civilian employee of the European Exchange System of the Army and Air Force Exchange Service

(AAFES), a nonappropriated fund instrumentality. He was discharged for alleged acts of misconduct incompatible with continued employment. Plaintiff seeks by this suit to recover from the United States back pay and appropriate allowances for the period following his alleged improper discharge. His action is grounded on the claim that his separation was arbitrary and capricious, was a breach of his contract of employment, and was in violation of due process and of prescribed regulations and procedures.

The United States has moved to have the petition dismissed on the procedural ground that no claim is stated within the jurisdiction of this court. For the reasons given below, we deny defendant's motion.[1]

LEGAL BACKGROUND

The doctrine of sovereign immunity precludes suits against the Federal Government unless such immunity has been specifically waived by an act of Congress. *United States* v. *Clarke*, 33 U.S. (8 Pet.) 436, 443 (1834). In this court, under the Tucker Act, 28 U.S.C. § 1491 (1970), only suits against the United States are permitted. Therefore, our jurisdiction exists only where such immunity has been waived. Prior to 1970, no act of Congress had waived sovereign immunity with respect to contracts of nonappropriated fund instrumentalities.

In 1942 the Supreme Court decided *Standard Oil Co.* v. *Johnson*, 316 U.S. 481 (1942). It held that a state statute which imposed a tax on the distribution of motor vehicle fuel would be unconstitutional if it was meant to apply to the Army's post exchanges. The exchanges, the Court said, "are arms of the Government deemed by it essential for the performance of governmental functions. They are integral parts of the War Department * * *." However, the Court

[1] Judge Skelton, in his carefully considered dissent, suggests *sua sponte* that "plaintiff has not alleged a cause of action even under the theory of the majority and his petition should be dismissed." While this suggestion is interesting, it is premature at this time to decide this issue. Defendant has neither asked nor even suggested that the petition be dismissed on the ground that no claim is stated on which relief could be granted. Rather, defendant has moved to have the petition dismissed solely on the question of jurisdiction. By our decision today we do not foreclose the possibility of a future dismissal on the substantive ground the dissenting judge suggests. We merely hold that this court does have *jurisdiction* over the claim asserted.

also stated that the "Government assumes none of the financial obligations of the exchange." 316 U.S. at 485.

This latter statement in *Johnson*, *supra*, has served as the basis for a series of decisions of this court holding that we lack jurisdiction over disputes involving claims against nonappropriated fund activities. The first such case was *Borden* v. *United States*, 126 Ct. Cl. 902, 116 F. Supp. 873 (1953). Borden had contracted with the Army Exchange Service to be a senior accountant for a 2-year period. The issue raised was whether the United States could be sued on this employment contract with a nonappropriated fund instrumentality. We held the United States could not be sued because, as the Supreme Court held in *Johnson*, *supra*, if the Government assumed none of the Army Exchange Service's financial obligations, then no consent had been given by the Government to such suits. A similar result was reached in *Pulaski Cab Co.* v. *United States*, 141 Ct. Cl. 160, 157 F. Supp. 955 (1958), wherein plaintiff company had a contract with an exchange to provide cab services. Again, in *G. L. Christian and Assoc.* v. *United States*, 160 Ct. Cl. 1, 312 F. 2d 418 (1963), *cert. denied*, 375 U.S. 954 (1963), we said in dictum, "[T]he contracts of such agencies [post exchanges, *et al.*] although made by Government officers, do not bind appropriated funds, do not create a debt of the United States, and may not be vindicated in this court." 160 Ct. Cl. at 14, 312 F. 2d at 425. More recently, in *Kyer* v. *United States*, 177 Ct. Cl. 747, 369 F. 2d 714 (1966), *cert denied*, 387 U.S. 929 (1967), we arrived at the same result with regard to a sales commission contract with a nonappropriated fund agency other than a post exchange.

Seeing the failure by other litigants to obtain relief under a contract theory, one plaintiff attempted to recover via a different route. In *Keetz* v. *United States*, 168 Ct. Cl. 205 (1964), the plaintiff sued to recover back pay on the ground that his separation from the AAFES as an employee was illegal. Rather than to assert a contract of employment, Keetz alleged that civilian employees of post exchanges were Federal employees and relied on the violation of regulations of the executive department as a jurisdictional basis for his suit. We denied recovery, holding that plaintiff was not a

Federal employee. No elaboration was made, but the *Keetz* court cited *Gradall* v. *United States*, 161 Ct. Cl. 714, 329 F. 2d 960 (1963), in which it was held that plaintiff's employment in the AAFES did not constitute a civilian "office or position under the United States Government" within the meaning of the dual compensation provision, § 212(a) of the Economy Act of 1932. In *Gradall*, the court reasoned:

> The trend of the pertinent decisions, statutes and regulations has generally been to establish that employees of Exchanges are not Federal employees, except for the purpose of unemployment compensation. However, this trend does not supply a definitive answer to what is meant by holding a position "under the United States Government" under the [Economy] Act of 1932. The Government contends that the logical and reasonable test is whether the services performed in the position constitute "Federal service" because performed for a Federal instrumentality, and not whether the person who holds the position is compensated by appropriated or nonappropriated funds. To accept this test as determinative merely because plaintiff performed services for a Federal instrumentality would be to accept an unrealistic and nebulous view of the actual "position" of both plaintiff and the instrumentality. For example, the American Red Cross, the United Service Organizations, the national banks, and several other institutions are "instrumentalities" of the Government. However, their employees are not subject to the dual compensation restrictions of the Act of 1932. No one has ever contended that they hold a position "under the United States Government" under the Act.

Gradall at 720–21, 329 F. 2d at 964.

In summary, the decisions of this court prior to the enactment of Pub. L. 91–350 (1970) have held that no jurisdiction has been granted to hear claims against the United States where a nonappropriated fund agency is involved since (1) the United States did not obligate itself on contracts of such agencies, and (2) employees of such agencies do not qualify as Federal employees.

ENACTMENT OF PUBLIC LAW 91–350

While this court recognized a lack of jurisdiction over claims against nonappropriated fund activities, we also rec-

ognized the harshness of the result which effectively precluded alleged injured plaintiffs from obtaining a forum in which the merits of their claims could be aired. In *Keetz*, *supra*, we stated:

> We are aware that plaintiff is placed in somewhat of a difficult position in that if he seeks redress of his claim in a Federal District Court directly against the Exchange Service his claim might be dismissed. * * * However, we believe that in these situations (especially where the question of the waiver of sovereign immunity is involved) it is up to Congress to remedy this apparent harsh result, and the courts should refrain from legislating by judicial fiat.

Id. at 207.

The injustice and inequity worked by this jurisdictional "loophole" was again identified in *Kyer*, *supra*, where we stated:

> We are mindful of the fact that the result reached spells an unduly harsh result. Plaintiff has searched in vain for a forum in which the merits of his claim might be aired. We add, though perhaps of little comfort, that the lack of jurisdiction which plaintiff has faced at every turn is a matter which sorely needs congressional correction.

Id. at 754, 369 F. 2d at 719.

It was within this setting that Congress, in 1970, enacted Public Law 91–350. The Tucker Act was amended in order to remove the sovereign immunity of the United States with respect to contracts of post exchange operations conducted within the military and the National Aeronautics and Space Administration. *See* H. R. REP. No. 91–933, 91st Cong., 2d Sess. 3 (1970).[2]

[2] Pub. L. 91–350 was originally passed by the Senate as S. 980. The Senate version would have completely removed the sovereign immunity of the United States with respect to contracts of all nonappropriated fund activities. See S. REP. No. 268, 91st Cong., 1st Sess 4–5 (1969). This bill was amended in the House of Representatives to remove immunity only from contracts of Exchange operations. The reason for this limitation was to insure that immunity would be waived with respect to nonappropriated fund instrumentalities *which have sufficient assets to pay their own way.* The amended act also added the requirement that the United States be reimbursed by the exchange instrumentality in the event any judgment against an exchange is paid by the United States. The intent of the House amendment was to eliminate any costs to the taxpayers of this expanded jurisdiction. *See* H.R. REP. No. 91–933, 91st Cong., 2d Sess. 3 (1970). The Senate agreed to the House amendments on July 14, 1970.

By this act, both 28 U.S.C. § 1346(a)(2)[3] and 28 U.S.C. § 1491[4] were amended to include the following new sentence:

> For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

Thus, for the first time, Congress expressly waived sovereign immunity to claims arising from post exchange contracts, thereby bringing such actions within our jurisdiction under the Tucker Act.

Applying this new amendment, plaintiff has asserted his claim can now be heard in this court. Relying on *Keetz*, *supra*, i.e., exchange employees are not Federal employees, plaintiff argues that his relationship with the AAFES is contractual, the same as employees in the private sector. He further argues that Congress intended to afford exchange employees relief when it enacted Pub. L. 91-350. Defendant, on the other hand, argues that Pub. L. 91-350 does not confer jurisdiction over plaintiff's claim. This position is based on defendant's characterization of exchange personnel as serving by "appointment" rather than by contract. Defendant also relies on the failure of Congress to expressly include exchange personnel in the 1970 amendment as evidence of the lack of intent to waive sovereign immunity in the instant case.

We agree with plaintiff.

Defendant's assertion that employment with the AAFES does not arise out of a contractual relationship is unfounded. Defendant relies on the fact that employees of the Federal Government generally serve by "appointment" rather than by virtue of a contractual relationship. As early as 1850, the Supreme Court has held that public officers do not have contracts of employment, but are appointed to office. *Butler* v. *Pennsylvania*, 51 U.S. (10 How.) 402 (1850).[5] This "ap-

[3] Concurrent jurisdiction granted to the United States District Courts.

[4] General jurisdictional grant to the United States Court of Claims.

[5] The rationale for this "appointed" status is that the Government must have the power to change the agents who carry out the public duties, as well as the terms under which they work. *Butler* v. *Pennsylvania*, 51 U.S. (10 How.) 402, 416-17 (1850). *See also Taylor* v. *Beckham*, 178 U.S. 548

pointment" status has been extended by law to include employees of the United States who are subject to the laws administered by the Civil Service Commission. *See* 5 U.S.C. §§ 2104, 2105, 3105 (1970). However, defendant's reliance on the "appointed" rationale begs the fundamental question of whether employees of nonappropriated fund instrumentalities are, in fact, Federal employees. If exchange employees are not Federal employees, their status is not controlled by the "appointment" rationale. And, indeed, we have stated in *Keetz*, *supra*, and reaffirm here, that "an employee of the Exchange Service is not an employee of the United States." *Keetz*, *supra*, at 207.[6] *See also Gradall*, *supra; Brummitt* v. *United States*, 165 Ct. Cl. 78, 80, 329 F. 2d 966, 967 (1964).

The employment status of non-Federal employees is governed by the same rules of law applicable to private employer-employee relationships. It is hornbook law that such a relationship is contractual in nature. *Fleming* v. *A. H. Belo Corp.*, 121 F. 2d 207, 214 n. 9 (5th Cir. 1941), *aff'd.* 316 U.S. 624 (1942), *reh. denied*, 317 U.S. 706 (1942); 53 Am. Jur. 2d, Master and Servant, §§ 14, 66 (1970). "It is a fundamental principle of law that the relationship of employer and employee is a relation created by contract, either express or implied." *Ward* v. *Atlantic Coast Line Railroad Co.*, 265 F. 2d 75, 83 (5th Cir. 1959), *rev'd on other grounds*, 362 U.S. 396 (1960). *See also New Amsterdam Cas. Co.* v. *Soileau*, 167 F. 2d 767 (5th Cir. 1948), *cert. denied*, 335 U.S. 822 (1948). It would thus seem clear that plaintiff's employment with the AAFES must be viewed as arising from either an express or implied contract, and we hold accordingly.

Defendant concedes that Pub. L. 91–350 confers jurisdiction over claims concerning exchange type operations founded on contracts. However, defendant argues exchange employee contracts are not the kind of contracts to be covered

(1900); *Crenshaw* v. *United States*, 134 U.S. 99 (1890); *United States* v. *Hartwell*, 73 U.S. (6 Wall.) 385 (1868); and *Urbina* v. *United States*, 192 Ct. Cl. 875, 428 F. 2d 1280 (1970).

[6] In fact, the Government in *Keetz* v. *United States*, 168 Ct. Cl. 205 (1964), argued that an AAFES employee had a contract of employment. We find it a bit ironic that in the instant case, the Government argues just the opposite. We can only assume that this inconsistency has occurred because the enactment of Pub. L. 91–350 now grants jurisdiction for exchange contract claims. We held the Government's contract theory in *Keetz* to be correct and see no reason to change in the instant case.

by the new Act. It maintains that Congress, in determining that jurisdiction should be granted, did not consider whether civilian exchange employees should be permitted to sue for their back pay. Relying on the principle that waivers of sovereign immunity are to be strictly and conservatively construed,[7] the Government argues that the absence of a clear expression of legislative intent to waive immunity against suits by exchange employees is fatal to plaintiff. We find the legislative intent less silent than defendant asserts.

While it is true that no such specific reference can be found, a reading of both the House and Senate Reports accompanying S. 980 clearly reveals that employment cases were considered when both houses spoke of removing a "loophole" [H. R. REP. No. 91–933, 91st Cong., 2d Sess. 2 (1970)] and "filling a gap" [S. REP. No. 268, 91st Cong., 1st Sess. 2 (1969)] in the Tucker Act's waiver of immunity. In both reports, *Kyer*, *supra; Pulaski Cab Co.*, *supra; Keetz*, *supra*, and *Borden*, *supra*, were cited as illustrative of the "loophole" or "gap" to be closed. All four cases relate to claims for pay or personal services as distinguished from claims of supply or construction contractors. We are convinced that correction of the harsh result imposed by the above cases was clearly within the intent of Pub. L. 91–350.

Although this case is one of first impression regarding the effect of Pub. L. 91–350 on exchange activity employee pay cases,[8] we are persuaded that our previous decisions in *Keetz*, *supra*, and *Gradall*, *supra*, regarding exchange employees' failure to qualify as Federal employees, coupled with the clear intent of Congress to close the jurisdictional "loophole" in the Tucker Act as it affects exchange employees, mandates denial of defendant's motion to dismiss for want of jurisdiction.

We realize that our holding is in conflict with the recent opinion of Judge Wisdom in *Young* v. *United States*, 498 F. 2d 1211 (5th Cir. 1974). The *Young* court held that Public

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[7] *King* v. *United States*, 395 U.S 1 (1969); *Soriano* v. *United States*, 352 U.S. 270 (1957); *United States* v. *Sherwood*, 312 U.S. 584 (1941).

[8] Although this issue was raised in *Travis* v. *United States*, 199 Ct. Cl. 67 (1972), we deferred decision on this difficult jurisdictional question since it was clear in *Travis* that plaintiff had no case on the merits. *See Travis*, *supra*, n. 1 at 70.

Law 91–350 does not confer jurisdiction under the Tucker Act to hear exchange employee cases. This result was reached by construing the legislative intent as not "extend[ing] Tucker Act jurisdiction to the sort of 'contract' plaintiff asserts existed in this case." *Young*, *supra*, at 1217.

The *Young* court viewed the absence of any specific mention of exchange employees in the 1970 amendment as a bar to jurisdiction.[9] The court reasoned that since, on other occasions, Congress had enacted legislation which dealt with exchange employees, in very direct and specific terms, the absence of such language is evidence of an exclusionary intent.

We respectfully differ.

The *Young* court completely overlooked the reference in both the House and Senate reports to cases decided by this court involving exchange employees and the harsh result of our lack of jurisdiction. This specific reference to *Keetz*, *supra; Pulaski Cab Co.*, *supra; Kyer*, *supra*, and *Borden*, *supra*, in our mind, negates any argument that Congress did not intend to cover exchange employee contracts when it enacted Pub. L. 91–350.

* * * * *

We hold that since plaintiff is not a Federal employee, his relationship with the AAFES is governed by contract principles. Thus, this court, by virtue of the 1970 amendment to the Tucker Act, has jurisdiction to grant a money judgment against the United States for an alleged improper discharge of an employee of a nonappropriated fund exchange type instrumentality.

Accordingly, defendant's motion to dismiss is denied, and the case is remanded to the trial division for decision on the merits.

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[9] The court in *Young* v. *United States*, 498 F. 2d 1211 (5th Cir. 1974) stated:

"Nowhere in the history of the amendments is there any direct reference to the relationship between the instrumentalities and their employees, much less any language that would support an inference that Congress intended these amendments as a vehicle for redressing grievances of employees of these instrumentalities as well as settling claims of third parties with whom the instrumentalities contract for goods and services."

Young, *supra*, at 1215.

Dissenting Opinion by Judge Skelton

SKELTON, *Judge*, dissenting:

I respectfully dissent. This court does not have jurisdiction to hear the merits of this case. The majority would have us take jurisdiction over a type of claim in which the government is immune from suit as sovereign and in which a clear reading of the case law and legislative history of the 1970 amendment to the Tucker Act shows that Congress has not explicitly waived immunity by giving consent to be sued in this kind of case.

The jurisdiction of this court is limited by the Tucker Act to claims "founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. * * *" 28 U.S.C. § 1491 (1970). Although this statute might have been interpreted to constitute a waiver of all non-tort money claims, we have limited our jurisdiction to claims in which there exists constitutional or statutory authority mandating Federal compensation either directly or indirectly. *Eastport Steamship Corp.* v. *United States*, 178 Ct. Cl. 599, 372 F. 2d 1002 (1967). With this limitation in mind, we have historically denied jurisdiction to money claims against nonappropriated fund instrumentalities since by their very nature their financial obligations are not obligations of the United States; until the most recent Tucker Act amendment there was no statutory or constitutional authority or mandate for Congress to appropriate funds to pay judgments obtained against nonappropriated fund instrumentalities. *See Dugan* v. *United States*, 34 Ct. Cl 458 (1899); *Williams* v. *United States*, 44 Ct. Cl. 175 (1909); *Kyle* v. *United States*, 46 Ct. Cl 197 (1911); *Woog* v. *United States*, 48 Ct. Cl. 80 (1913); *Kenny* v. *United States*, 62 Ct. Cl. 328 (1926); *Sullivan* v. *United States*, 92 Ct. Cl. 154 (1940); *Borden* v. *United States*, 126 Ct. Cl. 902, 116 F. Supp. 873 (1953); *Pulaski Cab Co.* v. *United States*, 141 Ct. Cl. 160, 157 F. Supp. 955 (1958); *Cockrill* v. *United States*, 155 Ct. Cl. 181, 292 F. 2d. 288 (1961); *Gradall* v. *United States*, 161 Ct. Cl 714, 329 F. 2d 960 (1963); *Keetz* v. *United States*, 168 Ct. Cl. 205 (1964); *Kyer* v. *United States*, 177 Ct.

Cl. 747, 369 F. 2d 714 (1966), *cert. denied*, 387 U.S. 929 (1967).

The Supreme Court confirmed the financial independence of nonappropriated fund activities when, in *Standard Oil Co.* v. *Johnson*, 316 U.S. 481 (1942), it declared the military Exchange Services were federal instrumentalities but limited the implications of this conclusion by stating: "The Government assumes none of the financial obligations of the exchange." 316 U.S. at 485. Unfortunately, the maintaining of sovereign immunity over claims against the Exchange Services created the anomalous situation in which an individual under contract with the Federal Government could bring suit in this court to remedy contractual claims while a similar contractor providing the same services with an Exchange Service such as the Army and Air Force Exchange Service (AAFES), could not. We have often noted the unfairness of this situation, stating in one case:

> We are mindful of the fact that the result reached spells an unduly harsh outcome. Plaintiff has searched in vain for a forum in which the merits of his claim might be aired. We add, though perhaps of little comfort, that the lack of jurisdiction which plaintiff has faced at every turn is a matter which sorely needs congressional correction. [*Kyer* v. *United States*, 177 Ct. Cl. 747, 754, 369 F. 2d 714, 719 (1966), *cert. denied*, 387 U.S. 929 (1967).]

In 1970, the Tucker Act was amended by the Act of July 23, 1970, Pub. L. No. 91–350, 84 Stat. 449, *amending*, 28 U.S.C. § 1491 (1964), [hereinafter P.L. 91–350] to close this apparent "loophole" by adding the following sentence:

> * * * For the purpose of this paragraph, an express or implied *contract* with the Army and Air Force Exchange Service * * * shall be considered an express or implied contract with the United States. [Emphasis supplied.] [28 U.S.C. § 1491 (1970).]

The majority would have us interpret this amendment so as to provide a waiver of sovereign immunity for all claims against the Exchange Services whether they are based on contract, regulation, or Act of Congress. I believe this is an unwarranted interpretation, and if permitted to stand, it would extend our jurisdiction to cover a vast panoply

of claims over which Congress never intended to consent to be sued. The language of the amendment is clear on its face, and, when combined with the prior case law and the legislative history, it is apparent that Congress only intended to extend our jurisdiction to cover contractual claims of third party independent contractors against the Exchange Services and not to AAFES employees' grievances.

In introducing this amendment to the Senate, Senator Tydings described its purpose as follows:

> Mr. President, nonappropriated fund activities are at present an anomaly of the law. When states have attempted to tax or regulate nonappropriated fund activities, these organizations have successfully argued that they are immune from taxation and regulation as instrumentalities of the United States. When sued in foreign courts, nonappropriated fund activities have successfully argued that as instrumentalities of the United States they are not liable to contract suit, except in the courts of the United States. Our own courts have held, and the Justice Department has concurred in such holdings, that employees of nonappropriated fund activities, engaged in the performance of their duties, are employees of the United States, so that the United States is liable, under the Federal Tort Claims Act, for their negligence within the scope of their employment. The United States has, in fact, sued in its own name to enforce contracts entered into by nonappropriated fund activities.
>
> Yet, today, although nonappropriated fund activities are continually identified with their parent department or agency of the United States, *contractors with such activities have found the court room door barred when they allege a breach of a contract by such an activity.* State courts have disclaimed jurisdiction to entertain the claims, holding that the federal courts are the appropriate forum. Both the federal district courts and the U.S. Court of Claims afford no relief because of the alleged loophole in the Tucker Act. Repeatedly, these courts have held that the Tucker Act's waiver of the sovereign immunity of the United States to contract suits is not broad enough to permit the Court of Claims or the U.S. District Court to entertain suits against nonappropriated fund activities. [115 Cong. Rec., Part 3, p. 3162 (1969).] [Emphasis supplied.]

Dissenting Opinion by Judge Skelton

In reporting favorably on S. 980, the Senate bill to amend the Tucker Act, the report of the Senate Judiciary Committee stated:

> S. 980 will fill a gap in the Tucker Act's waiver of immunity of the United States to claims *based upon contracts* with departments or agencies of the Government. The United States is liable in the Court of Claims of the United States and, in appropriate cases, in the district courts of the United States, to suits "upon any express or implied contract with the United States * * *." 28 U.S.C. 1491; 28 U.S.C. 1346(a)(2). The courts have repeatedly held, however, that the Federal Government's liability to suit under these sections *only exists with respect to contract obligations* to be paid out of appropriated funds. See, e.g., *Kyer* v. *United States*, 369 F. 2d 714 (Ct. Claims 1966); *Pulaski Cab Co.* v. *United States*, 157 F. Supp. 955 (Ct. Claims 1968); *Keetz* v. *United States*, 168 Ct. Claims 205 (1964); *Borden* v. *United States*, 116 F. Supp. 873 (Ct. Claims 1953). [S. Rep. No. 268, 91st. Cong., 1st. Sess. 2 (1969)] [Emphasis supplied.]

The House Judiciary Committee also favorably reported the bill and, describing its purpose as closing a "loophole" in the Tucker Act dealing with "claims based upon contracts with departments or agencies of the Government." [2 U.S. Code Cong. & Admin. News 3478 (1970).]

The intention of Congress to close a loophole with respect to contractual claims of third party independent contractors is further substantiated by the floor debate prior to the bill's passage. Speaking for the amendment, Representative Rogers of Colorado stated:

> Under the Tucker Act, the United States has waived its sovereign immunity *with respect to contract claims.* However, the construction given to the Tucker Act by the courts has left a loophole, which creates inequities for some claimants. This loophole exists *with respect to contracts entered into by those Federal instrumentalities* which operate as nonappropriated fund activities. In short, under present construction of the Tucker Act, a plaintiff with a legitimate claim against a nonappropriated fund activity is not entitled to any judicial relief. S. 980 as reported by the Committee on the Judiciary is intended to close this loophole *with respect to contracts*

> entered into by post exchange types of operations conducted within the Department of Defense and the National Aeronautics and Space Administration. [116 Cong. Rec., Part 8, 10,604–06 (1970)] [Emphasis supplied.]

Similarly, Representative Fish in commenting on the types of problems that necessitated an amendment stated:

> S. 980, as it passed the other body, would close this loophole in the Tucker Act by permitting the aggrieved party to sue the U.S. Government where the gravamen of the complaint *arises from a contract* with a nonappropriated fund activity. Such activity would then have to reimburse the United States for any judgment paid. [*Id.* at 10,605–06] [Emphasis supplied.]

The legislative history speaks clearly and unambiguously. Public Law 91–350 was intended by Congress to waive sovereign immunity solely over claims of third party independent contractors arising as a result of contracts with nonappropriated fund instrumentalities such as the AAFES. The legislative history is silent concerning claims against the AAFES by employees. No reference is made to the lack of a Court of Claims forum for the resolution of pay claims or other employment grievances for AAFES employees. It seems clear to me that Congress did not intend to provide additional remedies for nonappropriated fund instrumentality employees when it passed Pub. L. 91–350; its only aim was to correct an anomalous situation with respect to those third party independent contractors having explicit contracts with the Exchange Services.

Moreover, it is highly relevant to note that the AAFES, alone, had almost 80,000 civilian employees in 1970.[1] Certainly, if Congress planned to give such a vast number of individuals, together with thousands more in the four other Exchange Services, a new forum to present their employment grievances or pay claims, some statement would have been made to that effect by the two Judiciary Committee Reports or during the debates. The absence of such com-

[1] The five Exchange Services are: Army and Air Force Exchange Service, Navy Exchanges, Marine Corp Exchanges, Coast Guard Exchanges, and Exchange Councils of the National Aeronautics and Space Administration (84 Stat. 449). The record does not show the total number of their employees.

ment is, in my judgment, significant since sovereign immunity cannot be waived by implication, *United States* v. *King*, 395 U.S. 1, 4 (1969), or implied through the construction of an ambiguous statute, *General Mutual Ins. Co.* v. *United States*, 119 F. Supp. 352 (N.D.N.Y. 1953) as the majority would have us do. Rather, it must be unequivocally and unambiguously expressed. As the Supreme Court stated:

> * * * We think that this approach runs counter to the settled propositions that the Court of Claims' jurisdiction to grant relief depends wholly upon the extent to which the United States has waived its sovereign immunity to suit and that *such a waiver cannot be implied but must be unequivocally expressed. United States* v. *Sherwood*, 312 U.S. 584. * * * [Emphasis supplied.] [*United States* v. *King* at 4.]

The majority points to four cases cited by the legislative history, *Kyer* v. *United States*, *supra*; *Pulaski Cab Co.* v. *United States*, *supra*; *Keetz* v. *United States*, *supra*; and *Borden* v. *United States*, *supra*, as evidence of a concern Congress had for employment cases. I do not believe that these cases are illustrative of the point the majority is seeking to make. Each of these cases, with the exception of *Keetz*, *supra*, deals with independent suppliers of goods and services under explicit contract with the Exchange Services, not employees in any traditional sense, and was probably cited in the history merely to show that the doctrine of sovereign immunity stood as a bar against such contractual claims. The last case, *Keetz*, *supra*, although not involving a contract, is, as I will discuss, based on an incorrect reading of Court of Claims precedent.

Since, as the legislative history seems to indicate, Congress intended the amendment to serve as a waiver of sovereign immunity only over contract claims of independent third parties against the AAFES or other Exchange Services, we acquire jurisdiction in this case only if the plaintiff had such a contractual relationship with the AAFES. In reviewing the statutory scheme created by Congress and the case law that has developed since the Supreme Court decided in *Standard Oil Co.*, *supra*, that the AAFES is a federal

instrumentality, I am drawn to the conclusion that if an employee of an Exchange Service such as the plaintiff is a federal employee, he is such employee for limited purposes only. He is not an employee of the U.S. Army or Air Force, but only of the Exchange Service. His salary is paid out of nonappropriated funds over which this court has no jurisdiction. The following cases hold that such Exchange Service employees are federal employees in various situations: *Rizzuto* v. *United States*, 298 F. 2d 748, 749–50 (10th Cir. 1961); *United States* v. *Holcombe*, 277 F. 2d 143 (4th Cir. 1960), *aff'g* 176 F. Supp. 297, 299–300 (E.D. Va. 1959); *United States* v. *Forfari*, 268 F. 2d 29, 31, 35 (9th Cir. 1959), *cert. denied*, 361 U.S. 902; *Daniels* v. *Chanute Air Force Base Exchange*, 127 F. Supp. 920, 923–24 (E.D. Ill. 1955); *Brethauer* v. *United States*, 333 F. 2d 302, 304–06 (8th Cir. 1964); and *Aubrey* v. *United States*, 254 F. 2d 768 (D.C. Cir. 1958). None of these cases involved claims for wrongful discharge or back pay, but dealt with claims of tort, workmen's compensation, criminal law, etc.

In several contexts Congress has explicitly included Exchange Service employees within the rights and benefits extended to other federal employees. Thus, they are eligible for unemployment compensation benefits under 5 U.S.C. § 8501 (1970) as well as coverage under 5 U.S.C. § 7902 (1970), concerning federal safety programs. Similarly, AAFES employees are governed by the dual compensation provision of 5 U.S.C. § 5531 (1970). Where AAFES employees are not to be considered federal employees, Congress has directly and unambiguously so provided. For example, in 5 U.S.C. § 2105(c) it is declared:

> § 2105. Employee.
>
> * * * * *
>
> (c) An employee paid from nonappropriated funds of the Army and Air Force Exchange Service, [AAFES] * * * is deemed not an employee [of the United States] for the purpose of—
>
> (1) laws administered by the Civil Service Commission; or
>
> (2) subchapter I of chapter 81 [dealing with compensation for work injuries] and section 7902 of this title [federal safety programs].

The applicable Army/Air Force Regulation is to the same effect as follows:

> 1–4 Civilian Personnel. a. AAFES personnel are employees of an instrumentality of the United States which is an integral part of the Department of Defense. Since they are compensated out of nonappropriated funds, they are distinguished from other civilian employees of the Armed Services who are compensated from appropriated funds. For example, they are not held or considered as employees of the United States for certain purposes, such as the civil service laws and the Federal Employees Compensation Act (5 U.S.C. 2105). [AR 60–20/AFR 147–14, § 1–4 (Oct. 1968)]

Although excluding AAFES employees from the category of federal employees for the purposes of the Civil Service laws, Congress in § 2105 has clearly not precluded these employees from being federal employees for other purposes.

Similarly, the executive branch of government in certain circumstances groups AAFES employees with federal employees. For example, section 2(b) of Executive Order 11491, setting up a program of labor management relations in the federal service, states that employees of nonappropriated fund instrumentalities are to be included.

Case law similarly points to the conclusion that employees of an Exchange Service are federal employees for limited purposes only. In a long line of cases dealing with the Federal Tort Claims Act, 28 U.S.C. § 1346 (1970), the federal courts have considered those employed by the Exchange Service to be federal employees as far as tort claims are concerned. *See e.g.*, *Rizzuto* v. *United States*, *supra; United States* v. *Holcombe*, *supra; United States* v. *Forfari*, *supra;* and *Aubrey* v. *United States*, *supra.*

In this court the status of an AAFES employee has been dealt with very infrequently. The latest case considering this question was *Keetz* v. *United States*, 168 Ct. Cl. 205 (1964). In *Keetz*, decided before the passage of Pub. L. 91–350, an employee of the AAFES sued here for back salary claiming that the bar in this court against contractual claims with the Exchange Services did not apply since he was a federal employee *and not working pursuant to contract.* Instead, the plaintiff alleged that the gravamen of his complaint was a

refusal by the AAFES to comply with regulations due federal employees. This court denied jurisdiction as it had in all the preceding suits involving the AAFES, holding that in "other contexts" the court had held that employees of the AAFES were not federal employees and citing as support *Gradall* v. *United States*, 161 Ct. Cl. 714, 329 F. 2d 960 (1963) and *Brummitt* v. *United States*, 165 Ct. Cl. 78, 329 F. 2d 966 (1964). A close reading of those two cases will show that the court erred in relying on them in the *Keetz* case.

In *Gradall*, *supra*, the issue was whether an AAFES employee was a federal employee within the definition of the Dual Compensation Act. The court's holding that he was not a federal employee was merely dicta inasmuch as the written employment contract which defined the plaintiff's relationship stated in part that "although EUCOM exchange system is an instrumentality of the U.S. Government * * * *you are not considered to be a federal employee.*" [161 Ct. Cl. at 718, 329 F. 2d at 963] [Emphasis supplied.] A similar holding in *Brummitt*, *supra* is likewise only dicta, since this court found that the open mess which employed the plaintiff was at the time in issue neither a federal instrumentality nor a nonappropriated fund activity, but rather a private organization, and, therefore, a fortiori, the plaintiff could not be a federal employee. Because of its reliance on the barest form of dicta and its lack of independent analysis, the *Keetz* case in no way prevents the conclusion that the plaintiff is a federal employee, but only for limited purposes not germane here.

Article 2, Section 2 of the Constitution establishes that the only way one can become a federal officer is through appointment by the President or by the "head of a department" or by one to whom the power of appointment has been delegated. In *Crenshaw* v. *United States*, 134 U.S. 99 (1890), the Supreme Court held that even after appointment, a public officer had no vested or contract right in his office. The Court said:

> The primary question in this case, * * * is, whether an officer appointed for a definite time or during good behavior had any vested interest or contract right in his office of which Congress could not deprive him? The question is not novel. There seems to be but little dif-

ficulty in deciding that there was no such interest or right. * * * [*Id.* at 104.]

The Court further stated:

> * * * We have already shown, that the appointment to and the tenure of an office created for the public use, and the regulation of the salary affixed to such an office, do not fall within the meaning of the section of the Constitution relied on by the plaintiffs in error; do not come within the import of the term *contracts*, or, in other words, the vested, private personal rights thereby intended to be protected. * * * [Emphasis in original.] [*Id.* at 105.]

Again, in *Taylor* v. *Beckham*, 178 U.S. 548 (1900), the Supreme Court repeated its holding of *Crenshaw*, *supra*, and stated: "In short, generally speaking, the nature of the relation of a public officer to the public is inconsistent with either a property or a *contract* right." [Emphasis supplied.] [Footnote omitted.] [*Id.* at 577.]

In *Urbina* v. *United States*, 192 Ct. Cl. 875, 881, 428 F. 2d 1280, 1284 (1970), we held:

> * * * If, * * * plaintiff's reliance is on some theory of contract law, his position would not be improved since it is plain that public employment does not, in a situation such as is here involved, give rise to a contractual relationship in the conventional sense. *Borak* v. *United States*, 110 Ct. Cl. 236, 78 F. Supp. 123, *cert denied*, 335 U.S. 821 (1948). *Cf. Lawrenson* v. *United States*, 139 Ct. Cl. 370, 153 F. Supp. 790 (1957) * * *.

See also, *United States* v. *Hartwell*, 73 U.S. (6 Wall.) 385, 393 (1868).

In my dissent in *Testan* v. *United States*, 205 Ct. Cl. 330, 499 F. 2d 690 (1974), *cert. granted*, 420 U.S. 923 (1975), a case in which the majority found that plaintiff had an interest in a job position to which he had not been appointed, I summarized the law saying:

> Article 2, Section 2, of the Constitution provides that officers of the United States shall be appointed by the President or the heads of the departments, as Congress may direct. There is no other way a person can obtain a government job. *See United States* v. *Smith*, 124 U.S. 525 (1888); *United States* v. *Mouat*, 124 U.S. 303 (1888); and *Thomason* v. *United States*, 85 F. Supp. 742 (N.D.

Cal. 1948), *aff'd*, 184 F. 2d 105 (9th Cir. 1950). Government employment is not a contract, is not property and the due process clause of the Constitution does not apply. *Bailey* v. *Richardson*, *supra* [182 F. 2d 46 (D.C. Cir. 1950), *aff'd*, 341 U.S. 918 (1951)]; *Crenshaw* v. *United States*, 134 U.S. 99 (1890); *Taylor* v. *Beckham*, 178 U.S. 548 (1900); and *Jenson* v. *Olson*, *supra* [353 F. 2d 825 (8th Cir. 1965)]. Since the plaintiffs were never appointed to these jobs, they had no vested or property rights in them. Consequently when they were not promoted, they were not denied anything that they had a right to. [*Id* at 336, 499 F. 2d at 693.]

Again, in my dissent in *Chambers* v. *United States*, 196 Ct. Cl. 186, 451 F. 2d 1045 (1971), I stated:

> We can conclude from the authorities cited above that a government job is not property, *does not involve contract rights*, but does include, tenure, salary and duties. It can only be conferred by appointment as authorized by Congress. Unless a person has been so appointed, he is not in the government employ and is not a public officer. * * * [*Id.* at 229, 451 F. 2d at 1070.]

I am persuaded by the foregoing authorities that if the plaintiff was a federal employee by reason of his employment by the AAFES, he was such employee for limited purposes only as indicated above and held such employment *by appointment* and *not by a contract* with the Federal Government. Consequently, Pub. L. 91–350 does not apply.

Furthermore, I do not view Pub. L. 91–350 as intending to extend the Tucker Act's waiver of sovereign immunity to include the type of case we have here. A review of the quoted legislative history makes it clear that Congress intended only to remove the existing ban on jurisdiction to hear and decide suits involving contracts entered into by nonappropriated fund instrumentalities for supplies and services other than services of employees, and not as a waiver of sovereign immunity over employment grievances.

In *Young* v. *United States*, 498 F. 2d 1211 (5th Cir. 1974) the fifth circuit considered a case closely analogous to the instant case before us. The plaintiff in *Young* sought review and back salary for action taken by the AAFES discharging him from his position as an architect. He argued, in part, that Pub. L. 91–350 in amending the Tucker Act, 28 U.S.C.

§ 1346(a)(2) (conferring concurrent jurisdiction on the district court), extended the jurisdiction of the district court to hear his pay case because he had a contract with the Exchange Service. The district court dismissed the suit on the grounds that:

> * * * [T]he plaintiff's employment relationship with the Exchange Service did not constitute a contractual relationship that could give rise to an action under the Tucker Act, * * *. [*Id.* at 1214.]

The Fifth Circuit Court affirmed this action of the district court, thereby holding that the plaintiff did not have a contract with the Exchange Service.[2] The decision of the majority in the instant case that our plaintiff had a contract with the AAFES is in direct conflict on this point with the decision of the Fifth Circuit Court in the *Young* case. The Fifth Circuit Court, in reviewing the legislative history of Pub. L. 91-350 in the *Young* case, denied that the amendment conferred jurisdiction on the federal courts to hear plaintiff's claim, saying:

> * * * In construing the 1970 amendments to the Tucker Act, we cannot ignore the fact that, in the much larger statutory scheme embracing federal employment, Congress has, when it has thought such action appropriate, dealt with Exchange Service employees directly and specifically. In our view, this circumstance, coupled with the dearth of concern with employment relationships in the legislative history of the 1970 amendments, strengthens our conclusion that *those amendments were not intended to extend Tucker Act jurisdiction to the sort of "contract" plaintiff asserts existed in this case.* * * * [498 F. 2d at 1217.] [Emphasis supplied.] [Footnote omitted.]

The *Young* case, being "on all fours" with the instant case on the contract question should stand as clear and convincing precedent for our denial of jurisdiction. Thus, the amendments to the Tucker Act were not intended to waive sovereign immunity over Exchange Service employment grievance cases.

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[2] The district court decision was reversed and plaintiff was granted a new trial on other grounds.

The majority opinion goes against the plain language of the amendment, clear legislative history and convincing case precedent.

In any event, the plaintiff cannot recover under the theory advanced by the majority opinion to the effect that he is "governed by the same rules of law applicable to private employer-employee relationships" which "is contractual in nature." If this is true, the plaintiff could only claim that he had been hired for an indefinite time for personal services. It is well settled in the law applicable to private employer-employee relationships that a hiring of an employee by an employer that is indefinite as to time is not enforceable and is terminable at the will of either party at any time without liability. *See* 1 Williston, Contracts § 39 (1957), where it is stated:

> * * * [I]t is generally held that a hiring indefinite as to time is terminable at the will of either party and therefore creates no executory obligations. * * * [Footnote omitted.] [Id. at 119, Third Edition (Jaeger).]

In *Atchison, T. & S.F. Ry.* v. *United States*, 211 F. 2d 264 (10th Cir. 1954), the court said:

> * * * It is the well settled rule that a contract providing solely and exclusively for the rendition of personal services, fixing no period of time during which it shall be in force and effect, and failing to specify that a certain amount of work shall be performed under its terms, is terminable at the will of either party. * * * [Many cases cited.] [*Id.* at 265.]

See also Fibreboard Products, Inc. v. *Townsend*, 202 F. 2d 180 (9th Cir. 1953), where the court held:

> A contract for permanent employment is only a contract for an indefinite period of time and terminable at the will of either party, * * *. [*Id.* at 182.]

This is undoubtedly the general rule governing private employer-employee contractual relationships. Under the theory of the majority, all that the plaintiff had was employment that could be terminated at will by him or the AAFES without liability. The AAFES terminated the employment. The plaintiff has no rights under the Civil Serv-

ice laws or regulations and by statute no protection under the Lloyd-La Follette Act, 5 U.S.C. § 7501 (1970), which provides that:

> § 7501. Cause; procedure; exception.
> (a) An individual in the competitive services may be removed or suspended without pay only for such cause as will promote the efficiency of the service.

Therefore, plaintiff has not alleged a claim on which relief can be granted. In short, plaintiff has not alleged a cause of action even under the theory of the majority and his petition should be dismissed. *See Price* v. *United States*, 65 Ct. Cl. 91 (1928), *cert. denied*, 277 U.S. 587; and *Barea* v. *United States*, 115 Ct. Cl. 44 (1949).

In summary, it makes no difference whether plaintiff was a federal employee for limited purposes because of his appointment to a position by the Exchange Service, or whether he was a private employee of the Exchange Service with a private industry employer-employee type contract for personal services for an indefinite period of time, because this court has no jurisdiction to entertain his employment grievance in either case. If he was a federal employee for limited purposes because of his appointment to a position by the Exchange Service, he had no contract and Pub. L. 91–350, *supra*, does not confer jurisdiction on this court to hear his case. If he was a private employee of the Exchange Service and held a private industry type of employment contract for indefinite personal services, as the majority holds, when the Exchange Service terminated his employment, which it had a right to do without liability, all of his contract rights were also terminated and he has no claim on which relief can be granted. Furthermore, plaintiff's salary was being paid out of nonappropriated funds over which we have no jurisdiction. See the many cases cited above.

In any event, the plaintiff does not have a third party independent contract claim, being the only kind of contract claim as to which Congress waived sovereign immunity to suit when it enacted Pub. L. 91–350. The United States is immune from suit on all other nonappropriated fund claims including that of the plaintiff in this case.

The plaintiff cites *Service* v. *Dulles*, 354 U.S. 363 (1957) in support of his position. That case is clearly inapplicable. The plaintiff there was a regular foreign service officer of the Department of State whose salary was paid out of appropriated funds. The court held that he was improperly discharged because the regulations of the department were not followed. By contrast, the plaintiff in the instant case was not an employee of the Air Force or of the Army whose salary was paid out of appropriated funds, but was an employee of a nonappropriated fund instrumentality and received his pay from nonappropriated funds. The cases are clearly distinguishable.

The plaintiff also cites *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959), in support of his claim. That case is of no help to him. The facts are quite different and the cases are easily distinguishable. In that case the plaintiff was an employee of the Department of Interior. He was what is known as a Schedule A employee (*i.e.*, one occupying positions other than those of a confidential or policy-determining character) in the excepted service. *His salary was paid out of appropriated funds.* He had no civil service protected status and could have been discharged summarily without any reasons being given. However, the Secretary discharged him on security reasons invoking department regulations to do so, but he did not follow the regulations. The court held that since the Secretary gratuitously invoked the regulations, he was required to follow them and having failed to do so, the discharge was unauthorized. This is a highly technical point not involved in our case. That case is distinguished from the instant case because there the plaintiff was an employee of the Department of the Interior and his salary was paid out of appropriated funds. Whereas, in our case, the plaintiff was not an employee of any executive department, but was an employee of a nonappropriated fund instrumentality of the government and *his salary was paid out of nonappropriated funds.* The crucial fact is that here plaintiff was paid out of nonappropriated funds. This brings us back to the starting point that prior to the 1970 amendment of the Tucker Act (28 U.S.C. § 1491) it was universally held that courts had no jurisdiction of claims of employees of nonappropriated fund

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instrumentalities of the government. See cases cited above. In 1970 the Tucker Act was amended giving this court jurisdiction of cases founded upon any express or implied contract with the United States by reason of any such contract with any of the Exchange Services. Therefore, the sole question in this case is whether or not plaintiff had a contract within the meaning of the 1970 amendment. I have already demonstrated that this was not the case whether plaintiff was a federal employee or was a private employee of the Exchange Service. In my opinion, there is no way that plaintiff can bring his claim within the meaning of the 1970 amendment so as to confer jurisdiction on this court to entertain his suit.

For all of the reasons set forth above, the court should either grant defendant's motion and dismiss plaintiff's petition on the ground we do not have jurisdiction of his claim, or, without reaching the jurisdiction issue, dismiss plaintiff's petition because he has not alleged a claim on which relief can be granted, which was the course we followed in the cases of *Travis* v. *United States*, 199 Ct. Cl. 67 (1972); and *Monett* v. *United States*, 190 Ct. Cl. 1, 5 n. 4, 419 F. 2d 434, 436 (1969), *cert. denied*, 400 U.S. 846 (1970). *See also*, *Brooks* v. *Dewar*, 313 U.S. 354, 359–60 (1941); and *Flanigan* v. *United States*, 142 Ct. Cl. 600 (1958).

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512 F. 2d 1099

GERALD J. PEDEN v. THE UNITED STATES

[No. 174–73. Decided March 19, 1975]

ON PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

Civilian pay; dismissal; refusal to answer questions; agency level hearing; delay of Civil Service Commission in hearing appeal; criminal proceedings; Internal Revenue agent.—Plaintiff, a former GS–12 special agent of the Internal Revenue Service assigned since 1961 to investigate tax frauds, was removed by "adverse action" based on three charges. The charges were (I) conspiring to bribe IRS employees to influence them in performance of their official duties, (II) failure to report the conspiracies to higher officials, and (III) refusal to answer questions on matters of official interest during interrogation. Plaintiff seeks back pay, together with reinstatement to said position. On January 26, 1970, Treasury agents,

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following an investigation, interrogated plaintiff about tax liabilities of certain individuals, giving him *Miranda* warnings, but plaintiff refused to furnish any information, although warned that Sec. 1941.7 of the IRS Rules of Conduct required him to respond to questions on matters of official interest. On January 27 plaintiff was arrested under warrant for criminal violations related to said charges. On January 28 a notice of proposed removal was served. Following an "oral reply" on February 17, plaintiff was removed from service effective March 6. On March 11 he appealed to the Civil Service Commission and on April 21 he was notified that his appeal was suspended pending conclusion of criminal proceedings (as to which an indictment was subsequently handed down on June 24, 1971). On June 11, 1971, having failed in his efforts to have his administrative appeal reactivated, plaintiff appealed to the CSC Board of Appeals and Review (BAR), and on December 27 the suspension was lifted and a hearing was held. On April 5, 1972 plaintiffs dismissal was upheld and on April 21 plaintiff appealed to the BAR. In May 1972 the criminal trial was held, ending with a directed verdict of not guilty on 5 counts, jury verdict of not guilty on two and conviction on two. On October 17, 1972, after further complaints of delay, the BAR affirmed plaintiff's dismissal, and this suit followed. It is *held* (1) that absent assurance that plaintiff's responses would not be used against him in criminal proceedings, Charge III is disapproved; (2) that under the circumstances here the oral reply was as meaningful as could be expected; (3) that use in the administrative appeal proceedings of evidence developed during the criminal investigation, both before and after the separation proceedings, was proper to support the dismissal since, at the time the charges were made, the official who signed the charging letter was fully aware of the facts developed during the investigations and had sufficient probable cause to justify the charges; (4) that suspension of administrative proceedings pending criminal proceedings is an approved practice; and (5) that since the law required removal on Charge I and since Charge II was established by substantial evidence, disapproval of Charge III does not affect the result. Plaintiff's motion for summary judgment is denied, defendant's cross-motion is granted, and the petition is dismissed.

Civilian pay; Regulation of Executive Department; necessity for compliance with; refusal to answer questions; Customs and Treasury Manual.

[1] A Treasury Regulation requiring Internal Revenue Service employees to respond to questions on matters of official interest can be used to coerce information from an employee, who may be a criminal suspect, only if he is given adequate assurance that his responses will not be used against him in any criminal proceeding.

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Civilian pay; hearing; agency level hearing; presiding officer, function of.

[2] Where applicable regulations permit an employee to reply to dismissal charges personally and provide that the agency shall make a representative available to hear the reply, and where the officer involved attended the conference with no capability to discuss factual issues but only one charge which involved legal issues, and where the employee did not attend the conference and his counsel wished only to discuss legal issues, the fact that the officer was uninformed as to the factual foundation for the other charges which were of a criminal nature, if error, was harmless error, since a criminal investigation was in progress and informants' lives might have been endangered if a meaningful interchange on the facts of the criminal charges had occurred. Deficiencies in mere ritual should not by themselves thwart an agency in an adverse action if the employee receives the substance of what is realistic to expect in the circumstances.

United States ⇐ 36

Civilian pay; dismissal; appeal to Civil Service Commission; evidence.

[3] It was not procedural error when the Civil Service Commission in denying plaintiff's appeal of his dismissal considered evidence before it produced in the course of criminal investigation, which was stronger than that available at the time the charges were made, where the official who signed the charging letter had had daily oral briefings of the results of investigation made by undercover Internal Revenue agents which adequately supported the dismissal charges.

Officers ⇐ 72(2)

Civilian pay; dismissal; appeal to Civil Service Commission; delay of Commission in hearing appeal.

[4] Absent demonstrable prejudice, it has been the practice to "freeze" civil proceedings as well as appeals from civil service adverse actions when a criminal prosecution involving the same facts is warming up or under way. The "freeze" is not for the protection of the employee only, but also rises out of a sense that deferable civil proceedings constitute improper interference with criminal proceedings if they churn over the same evidentiary material.

Officers ⇐ 72(1)

Civilian pay; dismissal; arbitrary and capricious action; charges not sustained in criminal prosecution.

[5] It is well settled that an acquittal on criminal charges does not *per se* impair the substantiality of evidence of guilt of a corresponding charge made in an appeal from a Civil Service removal for cause.

Officers ⇐ 72(2)

Otto G. Obermaier, attorney of record for plaintiff. *Martin, Obermaier & Morvillo*, of counsel.

Marc J. Fink, with whom was *Assistant Attorney General Carla A. Hills*, for defendant. *Paul A. Zoss*, of counsel.

Before SKELTON, NICHOLS, and BENNETT, *Judges*.

NICHOLS, *Judge*, delivered the opinion of the court:

This action is brought before us on cross motions for summary judgment seeking our review of a decision by the Board of Appeals and Review (BAR) of the Civil Service Commission (CSC). Plaintiff is an ex-Government employee who was removed by "adverse action" and who asks the usual relief of reinstatement to the position and back pay. 28 U.S.C. § 1491, as amended. We find no triable issue of fact. The BAR decision is based on substantial evidence and is not arbitrary, capricious or contrary to law. Our review disclosed no prejudicial procedural error.

The plaintiff, Gerald J. Peden, was a GS–12 special agent of the Internal Revenue Service (IRS). His function was to investigate criminal tax frauds. The special agent is the unobtrusive fellow casually introduced to you midway in the audit of your income tax return, as the one who is now taking over. If you grasp the significance of his title, you gather your wits together and rush out to hire the ablest criminal lawyer you can obtain, at any cost. You know the prison doors are yawning for your reception.

Peden, a veteran and "preference eligible," had served in the above capacity since 1961, and had an excellent record. He was attached to the Intelligence Division and operated in White Plains, Westchester County, New York, as his duty station. On January 26, 1970, agents of the Inspection Service, a related branch of the Treasury, gave Peden the usual *Miranda* warnings and he declined to answer any of their questions. They then informed him that Section 1941.71 of the Rules of Conduct for IRS employees required him to "respond to questions on matters of official interest." They wanted to question him about the tax liabilities of Peter

Variano, Angelo Mascia, and others, they said, but he refused to furnish any information.

The following day Peden was formally arrested under warrant and charged with criminal violations. On January 28, 1970, the District Director of Internal Revenue served a formal notice on him, proposing to remove him from the Service for cause. On January 30, he was suspended for 30 days, without pay. The ensuing in-and-out minuet of criminal and civil proceedings lasting 2 and ½ years is the essence of this case, and the chronology is important. It presents real problems as to the proper way to go about removing a civil servant from office in face of dragged out criminal proceedings directly relating to his fitness to hold the office. It is the kind of case which possibly will not recur—or if it does, under different conditions—when the Speedy Trial Act of 1974, Pub. L. 93–619, 18 U.S.C. § 3161, is achieving its intended effect.

The January 28 "adverse action" notice makes three charges. Charge I is conspiring to bribe employees of the IRS to influence them in the performance of their official duties. Specification 1 under this relates to charges that plaintiff conspired with one Williams, representing taxpayer Variano, to have Williams pay bribes to various employees of the Manhattan District. The period stated is late October 1969 to early December 1969. Under Specification 2, plaintiff allegedly conspired with Williams, representing taxpayers Angelo Mascia and John Mascia, to the same ends. Charge II alleges failure to report the above conspiracies to higher officials. Charge III alleges refusal to answer questions on matters of official interest in the interview with the Inspection Service, mentioned above.

By 26 U.S.C. § 7214, part of the Internal Revenue Code, it is provided that if an officer of the United States, acting in connection with any revenue law, conspires to or colludes with any person to defraud the United States, or does or omits to do any act with intent to enable any other person to defraud the United States, he shall be "dismissed from office or discharged from employment and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both." There is also a provision

for judgment against the officer or employee in favor of any person injured.

This seems to say that immediately on the offense being known, not after conviction, the offender must be dismissed. Specifications 1 and 2 to Charge I allege matter seemingly requiring immediate removal, in view of this. Counsel have not discussed how this affects the case, and we do not treat it as decisive of anything. It does appear, however, that a point is early reached where a District Director is himself in violation of law if he knows of breaches of § 7214 and fails to take action.

On February 4, Peden requested a hearing. On February 5, he was given a new 30-day suspension. On February 17, his counsel appeared for him at the "oral reply", to be further discussed below. On March 4, the District Director formally removed Peden effective March 6. That day he appealed to the CSC which accepted the appeal on March 11.

On April 10, 1970, IRS refused to provide data on the case to the CSC, citing a request by the United States Attorney. On April 21, CSC notified Peden that the appeal was suspended pending conclusion of the criminal action.

Peden's attorney seems to have acquiesced in this for about a year; however, on April 5, 1971, he requested a hearing, which request he renewed on May 6, June 2, and June 9. On June 11, he appealed to the BAR.

All this time there was no indictment. Finally the District Court gave the Government a deadline to indict or drop the case. The Grand Jury handed down a 9-count indictment on June 24. The long delay is explained as due to the Government's need of testimony by Williams and one Powell, which was not available until Powell was convicted on June 10.

Peden's attorney applied again to the CSC on September 9, 1971, and on refusal he sued the CSC in the United States District Court on November 5. Judge Bonsal denied a preliminary injunction on the ground that a CSC hearing would allow Peden discovery of the criminal case against him far beyond the provisions of the Federal Rules of Criminal Procedure. We only know of this important decision through the affidavit of plaintiff's counsel, Mr.

Obermaier. In spite of this unfavorable ruling, he credits the suit for causing the CSC to move. On December 27, 1971, it lifted the suspension with the consent of the United States Attorney.

On January 14, 1972, IRS provided its files to CSC and on February 9 and 10 the CSC hearing took place in New York. On April 5, CSC upheld the dismissal of Peden on all three Charges, only striking part of Specification 2 to Charge I. Peden appealed to BAR April 21.

On May 22–26, 1972, the criminal trial took place before a jury. The presiding judge, Judge Frankel, directed a verdict of not guilty on 5 counts. The jury itself acquitted on 2 and convicted on 2. The convictions were on two counts involving activity for taxpayer Angelo Mascia. The activity for taxpayer Variano was the subject of only one count, and that count fell by directed verdict.

On October 17, 1972, after further complaints of delay BAR affirmed the dismissal. This suit followed.

I

Defendant attempts to defend Charge III in face of *Kalkines* v. *United States*, 200 Ct. Cl. 570, 473 F. 2d 1391 (1973). We cannot agree. The statements of the agents to Peden were a masterpiece of confusion. They told him per the *Miranda* formula that he could have counsel and did not have to talk. Thus, as a criminal investigator himself, he could have had no doubt he was suspected of having committed a crime. Then they told him, per the Treasury regulation, that he did have to talk. No explanation or resolution of this inconsistency was offered. According to our *Kalkines* decision, a regulation of this Treasury type can be used to coerce information from a criminal suspect only if he is given adequate assurance that his responses will not be used against him in any criminal proceeding. No such assurance was given here. *Terry* v. *United States*, 204 Ct. Cl. 543, 499 F. 2d 695 (1974), is not in point since there was no direct coercion by the agents and the regulation was not of the Treasury type. We do not consider Charge III further.

II

We turn to the "oral reply" of February 17, 1970. The conferees were Mr. Birnbaum, a GS–14 attorney who headed a section that conferred with taxpayers on civil tax disputes, and Mr. Morvillo, attorney for Peden. We agree with defendant that Mr. Birnbaum had the personal qualifications we found lacking in the "oral reply officer" appointed by the same agency in *Ricucci* v. *United States*, 192 Ct. Cl. 1, 425 F. 2d 1252, *motion for reconsideration denied*, 193 Ct. Cl. 120, 432 F. 2d 453 (1970). As stated in the per curiam opinion denying rehearing, the purpose of the oral reply is "significant conference and negotiation with management." (At 124, 432 F. 2d at 455). Mr. Birnbaum was well prepared to discuss Charge III, which involved legal rather than factual issues. He was not able to discuss Charges I and II at all, being wholly uninformed as to the factual foundation for them. We doubt if assigning an "oral reply officer" is normally adequate if he is as ill prepared as that. However, we cannot but regard the error as harmless in view of the circumstances. Peden, as both sides well knew, was a criminal suspect. Both sides went to the "oral reply" with no intention of discussing factual issues. This was assured on Peden's side by his staying away. Mr. Morvillo was free to make and did make the legal arguments he went there to make. Mr. Birnbaum's corresponding silence as to facts was assured by his knowing nothing he could wittingly or unwittingly reveal. The investigation was still going on, and informants' lives might have been endangered if a meaningful interchange on the facts had taken place.

The "oral reply" was more of a cat-and-mouse game than a negotiation, and in the circumstances nothing more could have been expected. The regulations are apparently defective in not providing for this common situation, and our *Ricucci* decision should have made it clear we were not speaking about an instance where the ousted employee was also a criminal defendant. We do not mean that the "oral reply" is not required in such circumstances, but that deficiencies in mere ritual should not by themselves trip up an agency in an adverse action if the employee gets the substance of what is realistic to expect in the circumstances.

Opinion of the Court

III

Plaintiff also says, or seems to say, that his appeal to the CSC was defeated only by evidence that did not exist or was not in the possession of the District Director when he signed the charges or when he removed the plaintiff from his position, and that the real issue was what evidence did the District Director then have. At the CSC hearing, incriminating evidence was given by Williams and Powell, who had recently themselves been convicted and would not, probably, have testified against Peden until that occurred. It is not denied and hardly could be that we have impliedly sanctioned the use of evidence (in proceedings of this type) that came into existence or became known only after the discharge. *Cohen* v. *United States*, 177 Ct. Cl. 599, 369 F. 2d 976 (1966), *cert. denied*, 387 U.S. 917 (1967); *Kowal* v. *United States*, 188 Ct. Cl. 631, 412 F. 2d 867 (1969). We suppose plaintiff's position to be that the District Director did not have probable cause on the firing date, or if he did, he failed to perpetuate a record of it so we can determine on judicial review whether he had it or not.

The case against Peden was originally made by two undercover IRS (Revenue) agents, Ruggiero and Fenton. During the investigation of Powell, Peden and Williams, they either carried concealed tape recorders or radio transmitters linked to remote tape recorders. In addition the IRS Inspection Service made transcripts and extensively debriefed Ruggiero and Fenton after each meeting with any of the suspects. Plaintiff has not and indeed cannot complain of any lack of contemporaneous record of these incriminating conversations.

The District Director did not hear the tapes or read the transcripts, but he had almost daily oral briefings on the unfolding events. However, by the hearing date his memory of just what he had heard had become fuzzy. It was a case of *quis custodiet custodes*. The special agents, supposedly the members of the Service most immune to any sin and error, were tainted by corruption to an unknown extent. Very wisely, and unlike some better known statesmen, he restricted knowledge of the investigation to the most urgent need to know, and created no files of papers when it could be avoided.

It would be somewhat absurd to say there was enough probable cause for a judicial officer to issue a warrant for Peden's arrest, as occurred here, but not enough for preparation of adverse action charges. The knowledge of the institution was the District Director's knowledge too. What an executive officer's subordinates know, he is chargeable with knowing, for many legal purposes. And the District Director was not required, when he signed the charging letter, to have a file physically in front of him with all the transcripts, statements and documents in it.

What might happen if the District Director's knowledge could not be reconstructed to the extent that was done here, or if it should appear he signed the letter on the basis of insufficient evidence or none, which was supplied to an adequate level before the hearing, are questions that do not arise in this case, and we do not consider.

IV

The last serious issue is that of delay, and like the others, it is inextricably intertwined with the fact that criminal charges were pending. We believe it has long been the practice to "freeze" civil proceedings when a criminal prosecution involving the same facts is warming up or under way. In the context of appeals from civil service adverse actions, we have repeatedly approved this practice. *Cohen* v. *United States*, *supra; Finn* v. *United States*, 152 Ct. Cl. 1 (1961). *See also*, *Polcover* v. *Secretary of the Treasury*, 477 F. 2d 1223 (D.C. Cir. 1973), *cert. denied* 414 U.S. 1001. The novelty here is not that there was a freeze, but that it was lifted before and not after the criminal trial.

In *Polcover*, *supra*, Circuit Judge Tamm says the practice is for the protection of the employee, and therefore the question arises whether an employee, as Peden here, can waive this protection, clamor for a speedy hearing, and claim denial of due process unless he gets it. We do not think the impropriety of a civil hearing in such circumstances is necessarily eliminated in this way, unless the United States Attorney joins in the waiver, as eventually he did here. The "freeze" we think is not for the protection of the employee only, but also rises out of a sense that deferrable civil pro-

ceedings constitute improper interference with the criminal proceedings if they churn over the same evidentiary material.

What would happen if the employee could show prejudice by the delay is a case not before us. We do not think any prejudice is shown here. It looks as if the agency was the more prejudiced if anyone was. It bore the risk, if its witnesses' memories had failed during the delay period, as to some extent they had. The plaintiff has not pointed to testimony he lost but would have presented had the hearing taken place sooner, and except by cross-examination he offered none as it was. The main utility to plaintiff of having the hearing in advance of the criminal trial was the opportunity of cross-examining the witnesses the Government was going to use at the criminal trial, including the undercover agents. The facts strongly suggest that any other purpose in demanding such timing was strictly secondary. Plaintiff's able counsel seized the opportunity presented him with both hands. This plaintiff was as well served by having the hearing shortly before the criminal trial, as he would have been by having it shortly after the appeal was taken, and better served in that the convicted witnesses Powell and Williams were available for his cross-examination.

Certainly, a CSC hearing that is in the nature of a dress rehearsal for a criminal trial, in which all the Government witnesses testify and are cross-examined at length, but the defendant to be does not, is potentially a big lift to the criminal defense and could well be decisive in securing an acquittal, if anything could. We find it extraordinary that counsel for the employee should be here complaining about such advantageous procedure for him. In passing, we note that the United States Attorney for the District was not even allowed to have an observer at the CSC hearing, while counsel for the agency candidly admitted he was not a trial lawyer. He did not do all that badly, but it helps illustrate the values involved. Yet, under the law, it is at least doubtful whether the District Director could have delayed serving his removal notice, once he knew the facts. Here everyone seemed to be doing his best in a situation that was sticky for everyone. We call attention to the difficulties without offering criticism of anyone or having any pat solution.

Syllabus

V

Plaintiff does not deny that sufficient material was received at the hearing to constitute substantial evidence that he committed the offenses alleged in Charges I and II. His situation as to Charge I, Specification 1, the Variano case, is not aided by his directed verdict of acquittal on the corresponding count of the indictment, Count 9. It is well settled that an acquittal on criminal charges does not *per se* impair the substantiality of evidence of guilt of a corresponding charge made in an appeal from a Civil Service removal for cause. *Polcover*, *supra*, *Finn*, *supra; See*, *Helvering* v. *Mitchell*, 303 U.S. 391, 397 (1938); *Silver* v. *McCamey*, 221 F. 2d 873 (D.C. Cir. 1955). In view of plaintiff's concession we have not deemed it necessary to set forth the evidence in detail. We do note that the conspiracy periods set forth in Specifications 1 and 2 were only part of the periods that were shown to have existed by the evidence. Plaintiff does not make anything of this here, so neither do we.

Since the law required removal on Charge I, and since Charge II was established by substantial evidence, our disapproval of Charge III does not affect the result.

Accordingly, the plaintiff's motion for summary judgment is denied, the defendant's motion for summary judgment is granted, and the petition is dismissed.

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512 F. 2d 1390

CHEYENNE-ARAPAHO TRIBES OF INDIANS OF OKLAHOMA, ET AL. v. THE UNITED STATES

[Nos. 342–70, 343–70. Decided March 19, 1975]

ON PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

Indian claims; fiduciary obligation of Government to Indians; deposit, care and investment of trust funds; summary judgment, when appropriate.—These consolidated cases on behalf of a number of tribes for themselves or as representative of larger or aboriginal groups, are before the court on cross-motions for summary judgment as to liability. For purposes of the motions the parties have agreed that two tribes for each suit are test plaintiffs. With one exception,

Syllabus

the various Indian trust funds involved have been held for long periods of time in the Treasury and credited with 4% simple interest pursuant to 25 U.S.C. § 161a; the interest, held in separate accounts, is not credited with interest and is totally unproductive. In 1918 the Secretary of the Interior was authorized to place trust funds in accounts in banks paying a higher rate of interest and to invest the funds "for the best interest of the Indians" in public debt obligations and in certain bonds or securities unconditionally guaranteed as to both interest and principal by the United States. The fiduciary duty which the United States undertook with respect to the funds includes the "obligation to maximize the trust income by prudent investment." Plaintiffs urge that the Government breached its obligation by failing to make their trust funds as productive as legally and practically possible. Because of the masses of documentary material presented with the motions for summary judgment which have not been meaningfully correlated to the ultimate issues of breach of fiduciary duty and absent sorting out, agreement of the parties on specified segments of the evidence, precise findings or helpful guidance, use of this court's summary judgment procedure is inappropriate as the primary means of initial determination. However, under Rule 101(e) the court has decided certain subordinate legal issues on the present record. It is *held* (1) that at least 12 of the types of bonds and notes eligible for investment as public-debt obligations of the United States and securities guaranteed by the United States listed by the Associate Solicitor of the Interior Department must be considered legal alternate investments for trust funds; (2) that defendant, as trustee, may not excuse lack of maximum investment return by the tribes' failure to request investment; (3) that the matter of availability of more productive returns in the earlier segment of the period in suit should be gone into further if defendant continues to press the point that they were not available; (4) that as to those funds which defendant retained in the Treasury, defendant is held to a strict standard of fiduciary duty and is liable to plaintiffs for all lost profits; (5) that except possibly for the earliest period, there were proper sources of investment yielding higher returns than 4%; (6) that the Government is liable for lost profits on the interest accounts; and (7) that in determining the maximum rates available, the trial judge will disregard the advice the Bureau of Indian Affairs received from the Office of Management and Budget that it might not invest in Government-guaranteed securities of certain agencies. The case is returned to the trial division for further proceedings under and consistent with this opinion.

Indian claims; fiduciary obligation of Government to Indians; generally.

[1] Funds appropriated to Indians to satisfy judgments of the Indian Claims Commission or of the Court of Claims, as well as funds produced by tribal activities, are, when kept in the Treasury, held

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in trust for the Indians. As trustee, the United States has undertaken an obligation of the highest responsibility and trust, an obligation doubly strict when the United States, by retaining Indian moneys in the Treasury, in effect borrows those funds.

Indians ⇐ 5

Indian claims; Court of Claims jurisdiction; review of discretionary acts of Secretaries of Interior and Treasury.

[2] Because the United States in effect imposes trust status on Indian funds, the jurisdiction of the Court of Claims to review discretionary acts of the Secretaries of the Interior and of the Treasury in administering the trust is broad enough to cover claims for breach of fiduciary duties in the care of Indians' funds by not making them productive (by not investing moneys ready for investment and also by delay in making funds available for investment), by not maximizing the productivity of funds, and by using the funds to the Government's benefit and to the detriment of the Indians.

Courts ⇐ 449(4)

Indian claims; tribal property; trust funds; deposit, care and investment.

[3] It is legally possible, depending on the state of the market, for the Secretary of the Interior, by investing funds in various authorized bonds or securities or by depositing them in authorized banks yielding higher rates of interest to provide the Indians with a better return than would be available if the funds were held in the Treasury.

Indians ⇐ 5

Indian claims; fiduciary obligation of Government to Indians, trust funds.

[4] The fiduciary duty which the United States has undertaken with respect to funds held in trust for the Indians includes the obligation to maximize the trust income by prudent investment, and the trustee has the burden of proof to justify less than a maximum return. A corollary duty is the responsibility to keep informed so that when a previously proper investment becomes improper, funds can be reinvested. While the trustee has a reasonable time in which to make the initial investment or to reinvest, he becomes liable for a breach of trust if that reasonable time is exceeded.

Indians ⇐ 5

Indian claims; pleading and practice; summary judgment; when appropriate.

[5] Where the court is presented, on motions for summary judgment, with the complex issue of whether the United States breached its duty in failing to make the Indians' trust funds as productive as legally and practically possible, and accompanying the motions are masses of documentary materials which the parties have not mean-

Syllabus

ingfully correlated to the ultimate issue of breach of fiduciary duty, leaving the court without helpful guidance, sorting out, agreement on specified segments of the evidence or precise findings, nor had the parties consulted the trial judge as to the suitability of submitting the problem to the court absent a full or partial trial on liability, use of the mechanism of summary judgment is inappropriate as the primary means of initial determination.

Courts ⇐ 470

Indian claims; pleading and practice; summary judgment; when appropriate.

[6] While the court has concluded that the posture of this case makes it inappropriate for decision, on cross-motions for summary judgment, of the complex issue of whether the United States breached its fiduciary duty to the Indians, since the motions have been argued and considered, pursuant to Rule 101(e) the court will consider material uncontroverted facts and decide such subordinate legal issues on the record presented and not delay proceedings by returning the entire matter to the trial judge.

Courts ⇐ 470

Agency; Government responsibility for acts of agencies.

[7] While most of the actions complained of in this suit were those of the Bureau of Indian Affairs, the United States cannot escape responsibility merely by showing that another department of the Government, i.e. the Treasury or the Office of Management and Budget, caused needless delay or mismanagement.

Indians ⇐ 5

Indian claims; pleading and practice; remand to trial judge; measure of damages.

[8] On remand to the trial judge to determine the extent of the Government's breach of its fiduciary obligation by failing to make the Indians' trust funds as productive as legally and practically possible, in fixing damages and absent a showing by the United States of specific immediate budgetary commitments by the tribes, claimed liquidity needs should be considered in the light of the actual history of the tribes' funds.

Courts ⇐ 486

Indian claims; fiduciary obligation of Government to Indians; trust funds.

[9] While consultation with the Indians concerning investment of their trust funds may have been a useful part of the Government's overall policy to make the Indians ready for dissolution of trust status, the Government was duty bound to make the maximum productive investment unless and until specifically told otherwise by the tribe and until the Government also made an independent judgment that the tribes' request was in its own best interest.

Indians ⇐ 5

Opinion of the Court

Indian claims; fiduciary obligation of Government to Indians; trust funds.

[10] When the Government retains Indian trust funds in the Treasury when investments yielding substantially higher returns were legally available, the Government is in effect borrowing the funds for its own benefit, and will be liable to the Indians for the difference between the maximum return available on legal investments and the interest actually paid by the Treasury.

Indians ⇐ 5

Pierre J. LaForce, for plaintiffs; *I. S. Weissbrodt*, attorney of record for the Confederated Tribes of the Colville Reservation, et al., *Weissbrodt & Weissbrodt*, *Ruth Duhl* and *Howard L. Sribnick*, of counsel. *Glen A. Wilkinson*, attorney of record for the Cheyenne-Arapaho Tribes of Indians, et al., *Wilkinson, Cragun & Barker*, *Foster De Reitzes*, *Angelo A. Iadarola*, *Frances L. Horn* and *Charles H. Gibbs, Jr.*, of counsel.

Herbert Pittle, with whom was *Assistant Attorney General Wallace H. Johnson*, for defendant.

Before DAVIS, NICHOLS, and KUNZIG, *Judges*.

DAVIS, *Judge*, delivered the opinion of the court:

These consolidated cases, before us on cross-motions for summary judgment as to liability, challenge the Government's performance of its fiduciary duties as trustee of funds belonging to various Indian tribes. The suits are brought on behalf of a number of tribes either for themselves or as representatives of larger or aboriginal groups, but for the purpose of these motions the parties have agreed that two tribes for each suit will be considered representative "test plaintiffs." No. 342–70 challenges the Government's management of judgment funds in the Treasury belonging to plaintiffs Southern Ute Tribe and Southern Ute Tribe as representative of the Confederated Bands of Ute Indians.[1]

[1] The Confederated Bands of Ute Indians is an aboriginal grouping of Indians which exists for litigation purposes only. The Southern Ute Tribe is a constitutent of the group and eligible to share in awards to the Confederated Bands, *see* 25 U.S.C. § 676a (1970). Earlier in this litigation, defendant opposed the representation of the Confederated Bands by the Southern Utes. We hold that, by agreeing to accept the Southern Utes as a representative of the Confederated Bands as a test plaintiff, after our earlier refusal to dismiss the representative claim, defendant has waived its initial opposition to this representation. *See* Trial Judge's Memorandum of Jan. 24, 1972 and the court's order of Sept. 29, 1972.

No. 343–70 challenges defendant's conduct with respect to other trust funds of plaintiffs Southern Ute Tribe and Hoopa Valley Tribe.

Both petitions allege that defendant breached its fiduciary duties in the care of plaintiffs' funds by not making the funds productive (by not investing moneys ready for investment and also by delay in making funds available for investment), by not maximizing the productivity of funds, and by using the funds to its own benefit and to the detriment of the tribes. It is clear from past opinions of this court and of the Supreme Court, and from the actions of both Congress and the Executive Branch, that funds appropriated to Indians to satisfy judgments of the Indian Claims Commission or of this court, as well as funds produced by tribal activities, are, when kept in the Treasury, held in trust for the Indians. *See United States* v. *Mason*, 412 U.S. 391, 398 (1973); *Seminole Nation* v. *United States*, 316 U.S. 286, 296–97 (1942); *Menominee Tribe of Indians* v. *United States*, 102 Ct. Cl. 555, 562 (1945); 10 CONG. REC. 214 (1880) (statement of Senator Edmunds); S. REP. No. 1396, 70th Cong., 2d Sess. 1–2 (1929) (letter from Sec'ty of the Interior West); 34 Op. Atty. Gen. 439, 442 (1925). We have ruled that the United States as trustee has undertaken an obligation "of the highest responsibility and trust," *Seneca Nation of Indians* v. *United States*, 173 Ct. Cl. 917, 925 (1965), an obligation doubly strict when the defendant, by retaining Indian moneys in the Treasury, in effect borrows those funds. *Menominee Tribe of Indians* v. *United States*, *supra*, 102 Ct. Cl. at 562; *see Navajo Tribe of Indians* v. *United States*, 176 Ct. Cl. 502, 507–08, 364 F. 2d 320, 324 (1966); *Menominee Tribe of Indians* v. *United States*, 101 Ct. Cl. 10, 19–21 (1944). We have also held that because the United States in effect imposes trust status on the Indian funds, our jurisdiction to review discretionary acts of the Secretaries of the Interior and of the Treasury in administering the trust is broad enough to cover the types of claims made here. *See United States* v. *Seminole Nation*, 146 Ct. Cl. 171, 179–80, 173 F. Supp. 784, 789–90 (1959); § 24 of the Indian Claims Commission Act, 60 Stat. 1049, 1055, 28 U.S.C. § 1505.

Test plaintiff Southern Ute Tribe is (or was during the relevant period) the beneficial owner of two judgment fund accounts, a proceeds of labor account,[2] a fourth principal account and five interest accounts held in the Treasury. The balances in the accounts at times totaled several million dollars. Even larger amounts were held in the accounts of the Consolidated Ute Tribes, represented here by the Southern Utes. The Hoopa Valley Tribe was the owner of a proceeds of labor account, the balance of which never fell below $1,000,000 from July 1964 to early 1970, and which at times held as much as $3,000,000, and an interest account to which interest on the proceeds of labor account was credited.

When Congress, in the exercise of its power over the Indians, determined by statute and by treaty to hold funds due the tribes in trust rather than immediately distributing them to the Indians, it also developed a series of investment policies for those funds. We are not faced here with a claim that Congress breached its trust duties under the Constitution or treaties. *See Menominee Tribe of Indians* v. *United States*, 101 Ct. Cl. 10, 21 (1944); *compare Navajo Tribe of Indians* v. *United States*, No. 256–69 (Ct. Cl., filed May 28, 1969) (alleged violation of Fifth Amendment in statutory provision for lower rate of interest on Indian funds than on other trust funds). Rather, plaintiffs urge that the Bureau of Indian Affairs has not properly used the tools Congress provided in order to meet the Government's fiduciary obligation.

The statutory scheme is that Indian trust funds deposited in the Treasury are to earn interest at the rate provided in the appropriate treaty or appropriations bill, and that if no interest rate is specified, the funds are to earn four percent simple interest per year. 25 U.S.C. §§ 161a, 161b (1970). In *Menominee Tribe of Indians* v. *United States*, 97 Ct. Cl. 158, 163–65 (1942), the court held that this provision prohibited the Treasury from paying interest on the interest earned by

[2] A proceeds of labor account holds "All miscellaneous revenues derived from Indian reservations, agencies, and schools * * * and not the result of the labor of any member of such tribe. * * *" 25 U.S.C. § 155 (1970). Since 1930, money held in the Treasury in proceeds of labor accounts has earned four percent simple interest. 25 U.S.C. § 161b (1970).

funds on deposit. *Cf. Peoria Tribe of Indians* v. *United States*, 390 U.S. 468, 473 n.6 (1968). Accordingly, the various interest funds owned by plaintiffs, when held in the Treasury, are totally unproductive. Defendant has in fact paid four percent simple interest on plaintiffs' other funds,[3] and if this were the limit of the Government's power, plaintiffs' claim, which does not attack the statutes, would have to fail.

However, holding the money in the Treasury is only one of defendant's statutory alternatives. Until 1880, tribal funds, rather than being deposited in the Treasury, were required by law to be invested, usually at a minimum rate of return of 5%. *See* Act of January 9, 1837, ch. 1, 5 Stat. 135, R.S. § 2096; Act of September 11, 1841, ch. 25, 5 Stat. 465, R.S. § 3659. Because of defaults on some bonds in which the Secretary of Interior had invested and due to declining interest rates, Congress provided by the Act of April 1, 1880, ch. 41, 21 Stat. 70, for the holding of moneys in the Treasury and payment of interest as an alternative to investment when the Secretary of Interior "is of the opinion that the best interests of the Indians will be promoted by such deposits, in lieu of investments." *See* 10 CONG. REC. 213–15, 720 (1880); S. REP. No. 186, 46th Cong., 2d Sess. 1–2 (1880); F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 105 n.210 (1942). Interest on Indian trust funds, where no rate was specified by the law or treaty setting up the fund, was set at four percent by the Act of Feb. 12, 1929, ch. 178, 45 Stat. 1164. In 1918, Congress clarified and limited the Secretary's power to invest rather than hold Indian funds by providing that the Secretary could withdraw Indian funds from the Treasury and place them in banks where such banks paid a higher rate of interest than the Treasury was obligated to give,[4] and he could also invest the funds "for the best interest of the Indians" in "any public-debt obligations of the United

[3] In one account of one of the test plaintiffs, 5% interest was paid.

[4] Funds may be placed in commercial banks only when such banks provide either a bond or collateral in the form of United States public-debt obligations or "other obligations which are unconditionally guaranteed as to both interest and principal by the United States" to the extent funds deposited exceed deposits insured under the Federal Deposit Insurance Act. 25 U.S.C. § 162a (1970).

States and in any bonds, notes, or other obligations which are unconditionally guaranteed as to both interest and principal by the United States."[5] Act of May 25, 1918, ch. 86, § 28, 40 Stat. 591, *as amended by* Act of June 24, 1938, ch. 648, § 1, 52 Stat. 1037, *codified at* 25 U.S.C. §162a (1970).

It is therefore legally possible, depending on the state of the market, for the Secretary, by investing rather than holding Indian funds, to provide the Indians with more than 4 percent simple interest. Because the investments are required by statute to be either heavily collateralized (in the case of bank deposits) or guaranteed by the Government, safety is not an issue. Moreover, because of the existence of a secondary market in many of the permitted investments (*e.g.* Treasury bills, Federal Home Loan Bank Board notes, Federal Intermediate Credit Bank notes, etc.), sudden requirements for cash do not present major obstacles to these types of investments.[6] The four percent attainable by retaining the funds in the Treasury is, as another court has stated, a floor rather than a ceiling. *Manchester Band of Pomo Indians, Inc.* v. *United States*, 363 F. Supp. 1238, 1243–44 (N.D. Cal. 1973).

The fiduciary duty which the United States undertook with respect to these funds includes the "obligation to maximize the trust income by prudent investment," and the trustee has the burden of proof to justify less than a maximum return. *See Blankenship* v. *Boyle*, 329 F. Supp. 1089, 1096 (D.D.C. 1971). *See also* RESTATEMENT OF TRUSTS 2d § 181 (1959). A corollary duty is the responsibility to keep informed so that when a previously proper investment be-

[5] The most complete recent listing of bonds and notes eligible for investment under this provision is found in the opinion of the Associate Solicitor, Indian Affairs, dated May 3, 1968, Defendant's Exhibit 50.

[6] It is unclear whether the Treasury, through which defendant now purchases securities, can or does act as a broker for secondary market purchases. However, we find nothing in the statutes or legislative history to indicate that defendant may not purchase or sell eligible securities in the secondary market when doing so would enhance yield or liquidity. If the Treasury cannot act for defendant in that market, 25 U.S.C. § 160 (giving the Treasury custody over Indian securities), which was enacted solely as a housekeeping measure after an Interior Department fire, 10 CONG. REC. 720 (1880), does not preclude use of a commercial broker where fees are reasonable. *See* 4 CONG. REC. 617, 638, 881, 1394 (1876).

comes improper, perhaps because of the opportunity for better (and equally safe) investment elsewhere, funds can be reinvested. While the trustee has a reasonable time in which to make the initial investment or to reinvest, he becomes liable for a breach of trust if that reasonable time is exceeded. RESTATEMENT OF TRUSTS 2d §§ 231 and comm. b, 181 and comm. c (1959).

This is the general law governing the Government's duty and responsibility toward the Indian funds involved in this case. The real problem arises when we attempt, on these cross-motions for summary judgment, to decide precisely to what extent there was in these cases a breach of those obligations. The essence of plaintiffs' assertions is that defendant failed to make their trust funds as productive as legally and practically possible. But the method the parties have chosen to present to the court this complicated question makes it wellnigh impossible to give any definitive answer at this time. The motions for summary judgment are accompanied by great masses of documentary materials which the parties have mechanically collated but which they have not meaningfully correlated to the ultimate issues of breach of fiduciary duty. The court was left to wander and wallow, for itself, in this morass of documentation without helpful guidance, sorting out, agreement of the parties on specified segments of the evidence, or precise findings. Moreover, we were told at the bar that the litigants did not consult the trial judge to determine whether he felt that it was appropriate to dump the entire problem in the court's lap or whether he could simplify and speed the process of determination by a full or partial trial on liability. In these circumstances and in a matter of this magnitude and complexity, we think that it was inappropriate to use the mechanism of summary judgment, in the gross form in which the parties availed themselves of that procedure, as the primary means of initial determination. Nevertheless, now that the motions are before us and have been argued and considered, we shall not delay the proceedings by simply returning the case to the trial division without any decision. We shall, instead, make use of

our Rule 101(e) which permits us to decide that certain material facts are not substantially controverted and to decide those subordinate legal issues we can determine on the present record.

For these reasons, we have concluded that we are in no position at this time and on the present record to give a complete answer, although we can decide several specific points (to be listed *infra*). There must be further proceedings in the trial division which will refine exactly what the Government should have done. We shall leave to the trial judge the determination of the maximum return available during the period at issue,[7] of the reasonable periods the Government had to consider what to do and then to do it, and of the various defenses and argument defendant may raise (except those we reject in this opinion).

In assessing the return available outside of the Treasury, both in the earlier segment of the period and later, the trial judge should take into account the availability of eligible investments through the secondary markets as well as directly from the issuer. He will, in addition, have to decide the length of time within which it would have been reasonable for defendant to make funds available for investment, to make actual investments, and to reinvest where appropriate.[8] As to funds which were invested, but at rates less than those found by the trial judge to be the maximum available, the trial judge will have to determine whether defendant breached its duties by not making a switch in investments which would have been made by "a man of ordinary pru-

[7] Obviously, there will not be one maximum for the entire period, nor for all lengths of investments. The trial judge may wish either to fix a maximum yield for each of several terms of investment for each of several smaller periods of time, or to determine for which periods and for how long funds were available and then find the maximum only for those periods and terms. In the absence of any suggestion by the parties how a maximum is to be determined, either method suggested above, or some other appropriate system, appears proper.

[8] While most of the actions complained of in this suit were those of the Bureau of Indian Affairs, defendant cannot escape responsibility merely by showing that another department of the government, *e.g.* the Treasury or the Office of Management and Budget, caused any needless delay or mismanagement. *See Giglio* v. *United States*, 405 U.S. 150, 154 (1972) (one part of government responsible for promises of another).

dence * * * in dealing with his own property."[9] RESTATEMENT OF TRUSTS 2d § 174 (1959).

There are, as already indicated, several specific points on which we can now rule definitively. We have already pointed out (note 5, *supra*) that the Associate Solicitor of the Interior Department has listed the bonds and notes eligible for investment as public-debt obligations of the United States and securities guaranteed by the United States. Since defendant does not contest the correctness of its own attorney's opinion, we hold that at least twelve of the obligations listed by him must be considered legal alternate investments for trust funds.[10]

Secondly, defendant says that any failure in productivity was due to its policy of consulting the Indians before investing and the plaintiffs' failure to respond to its requests for advice. Our ruling is that while such consultation may have

[9] In fixing damages, it will be necessary for the trial judge to make some determination as to the term for which funds were available for investment. In the absence of a showing by defendant of specific immediate budgetary commitments by the tribes, claimed liquidity needs should be considered in the light of the actual history of the tribes' funds. *See Blankenship* v. *Boyle*, 329 F. Supp. 1089, 1096 (D.D.C. 1971).

[10] These twelve are as follows:

1. Export-Import Bank participation certificates.
2. Federal National Mortgage Association participation certificates issued pursuant to 12 U.S.C. § 1717(e) (1964), *as amended* (Supp. II, 1965–66).
3. All other obligations, participations, or other instruments of the Federal National Mortgage Association by authorization in 12 U.S.C. § 1723c (1964).
4. Debentures of the Federal Housing Administration issued pursuant to 12 U.S.C. § 1710(d)
5. Farm loan bonds issued by federal land banks, 12 U.S.C. § 941.
6. Obligations of the Federal Home Loan Banks, 12 U.S.C. § 1435.
7. Debentures of the Federal Intermediate Credit banks, 12 U.S.C. § 1045.
8. Debentures of the banks for cooperatives, 12 U.S.C. § 1134m.
9. Bonds, notes, and other evidences of indebtedness of the Tennessee Valley Authority, by authorization in 16 U.S.C. § 831n–4.
10. Notes guaranteed as to principal and interest by the Small Business Administration pursuant to 15 U.S.C. § 683(b).
11. Bonds issued by local housing authorities secured by annual contributions contracts with the United States.
12. Bonds or notes of local housing and urban renewal authorities secured by a contract or requisition agreement with the United States.

The Associate Solicitor's opinion also mentions several types of commercial paper backed by United States insurance and loan guarantees, the purchase of which would appear to require participation in the substantive activity underlying the obligation (*e.g.*, shipbuilding) and which may not, therefore, be proper investments. Plaintiffs, on remand, will be free to prove that these or any other securities are proper investments under section 162a, but defendant will be held to have admitted that the twelve types of securities listed above are proper.

been a useful part of defendant's overall policy to make the Indians ready for dissolution of trust status, the Government was duty bound to make the maximum productive investment unless and until specifically told not to do so by a tribe and until defendant also made an independent judgment that the tribe's request was in its own best interest. We find no evidence in the present record of such requests in the case of any of the test plaintiffs.

Third, defendant argues that more productive investments were not available during the earlier part of the period. Defendant has stipulated to the contrary at least from May 10, 1965 onward, *see* Joint Stipulation of Facts No. I, paras. 9–10, so that the only period for which plaintiffs are claiming about which there may be disagreement on this issue is July 1, 1964 to May 10, 1965. If defendant continues to press this point, the matter of the availability of more productive returns in the earlier segment of the period in suit should be gone into further.

Fourth, on those funds which defendant in effect borrowed from plaintiffs by retaining them in the Treasury, we hold defendant to a strict standard of fiduciary duty—if eligible investments were available at higher yields, defendant will be liable to plaintiffs for the difference between what interest defendant paid for the funds and the maximum the funds could have legally and practically earned if properly invested outside.

Fifth, we find that, except possibly for the earliest period, there were in fact, at all relevant times, proper sources of investment outside the Treasury which would have yielded higher returns than 4%. As already indicated, we do not determine the length of the reasonable periods in which the Government should have acted or the validity of its possible excuses, if any, for failing to act at all or in due time (other than those dealt with in this opinion).

Sixth is the problem of the interest accounts on which no interest was paid at all. Defendant's own exhibits show that as early as 1963 the unproductive interest funds of both the Chemehuevi and Hoh tribes were withdrawn from the Treasury to earn interest in commercial banks—a policy defendant encouraged. *See* Defendant's Exhibit 50. Since defendant

had available at all relevant times outside investments which would have yielded some substantial return, we hold that the Government is liable for lost profits on those interest accounts.

Finally, in determining the maximum rates available, the trial judge will disregard the advice the Bureau of Indian Affairs received from the Office of Management and Budget (OMB) that it might not invest in Government-guaranteed securities of certain agencies. That advice was based on internal accounting policies of the OMB, and was in clear derogation of defendant's statutory right to invest in those securities,[11] a right recognized by the Department of the Interior at least since 1966, but disregarded in the face of OMB pressure. *See* Defendant's Exhibits 13, 13A, 4, 5; Plaintiffs' Exhibit 1.

On these grounds, we make under Rule 101(e) the orders specified above and return the case to the trial division for further proceedings under and consistent with this opinion, see Rule 101(e) and Rule 131(c)(2).

NICHOLS, *Judge*, concurring:

I concur in Judge Davis' opinion. I would like, however, to stress, even more strongly than he does, the utter inappropriateness of invoking our summary judgment procedure in this case at this juncture, with the hope that no one will copy plaintiffs' measures in future cases.

In my opinion, the procedure in *Trans Ocean Van Service* v. *United States*, 192 Ct. Cl. 75, 426 F. 2d 329 (1970), after Rule 131(c) proceedings 200 Ct. Cl. 122, 470 F. 2d 604 (1972) shows how, within the present Rules, a multiplicity of separate claims can be handled even though they involve a complex cross entangling of numerous legal and factual issues, as I think these claims do.

I went to the oral argument in this case, after spending much time with the briefs and record, in a state of utter

[11] The legislative history of 25 U.S.C. § 162a plainly shows that the statute was designed to allow investment in precisely those types of agencies, e.g., the Home Owners' Loan Corporation and the Federal Farm Mortgage Corporation, which the OMB memorandum disallowed. S. REP. No. 531, 75th Cong., 1st Sess. 2 (1937); H. REP. No. 1192, 75th Cong., 1st Sess. 2 (1937); S. REP No. 1630, 74th Cong., 2d Sess. 2 (1936).

perplexity as to what useful action we could possibly be expected to take. I asked plaintiffs for a draft order in hopes of getting light as to this. With his greater wisdom, Judge Davis has managed to salvage something of value out of an exercise I expected to be a total loss.

In general, a judgment is a pronouncement by the court as to the legal consequences of established facts. A roving pronouncement of the law supposedly applicable to a case, independent of the facts, is not a judgment of itself, and a motion for summary judgment is not an appropriate means of eliciting such a pronouncement, supposing it is appropriate for the court to make it. A motion for summary judgment under Rule 101(a) is not an appropriate means to use in good faith for eliciting a partially dispositive order under Rule 101(e) even though, as here, such an order may sometimes be the result. The filing of a motion for summary judgment suspends the jurisdiction of the trial judge per Rule 14(b)(2), whereas this case is, of all others, one where the services of a trial judge are most needed. At present, our clerk has no option to do anything with cross motions for summary judgment except to calendar them for argument before a panel of judges. And finally, our trial division has many important functions besides conducting trials. For one thing, a pre-trial conference under Rule 111 may be an appropriate means of settling on further procedural steps, and perhaps even avoiding a trial. Parties should consider the operational effect of the moves they make.

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513 F. 2d 1342

LYKES BROS. STEAMSHIP COMPANY, INC. v. THE UNITED STATES

[No. 375-69. Decided March 19, 1975]

ON THE PROOFS*

Taxes; investment credit; construction-differential subsidy program of the Merchant Marine Act of 1936.—This case concerns the appli-

*We agree with the result reached by Trial Judge Lloyd Fletcher but have modified and expanded the grounds upon which his conclusion is based. We also agree with his findings of fact and have set out so much thereof as are necessary to a decision in this case.

Syllabus

cation of the investment tax credit provisions of the Internal Revenue Code of 1954, 26 U.S.C. §§ 38, 46–48, and applicable regulations. The specific issue is whether certain vessels constructed under the construction-differential subsidy (CDS) program of the Merchant Marine Act of 1936 constitute property "the construction * * * of which is completed by the taxpayer after December 31, 1961" in accordance with § 48(b)(1) so that plaintiff is entitled to only a limited tax credit, or whether the investment credit for the ships should be measured by plaintiff's entire basis in the vessels pursuant to § 48(b)(2). In 1954 the Government (Maritime) asked plaintiff and other shippers to comment on the suitability of cargo vessels "Mariner" and "Clipper" as replacements for modernization of their fleets. Plaintiff advised Maritime that neither design was satisfactory and proposed a more acceptable replacement vessel. Under the CDS program all ship designs are subject to approval by Maritime. Plaintiff was informed that its proposal lacked details necessary for a decision on plaintiff's application for CDS, whereupon plaintiff employed naval architects to design the vessel. After numerous conferences with Maritime officials concerning speed requirements and basic design, a compromise was reached and plaintiff's application for CDS was approved. Thereafter, the plans and specifications were used to invite construction bids from domestic shipyards whose eligibility and responsibility Maritime determined. Construction contracts for the four ships in issue were awarded to Bethlehem Steel Company, the ships to be constructed at its Sparrows Point shipyard. Bethlehem undertook to furnish all labor and materials, to select suppliers for the materials, and to perform all work necessary to construct, complete and deliver (at its own risk and expense) the contract vessels. During construction in addition to the contract plans and specifications Bethlehem had to rely on "working plans" which require basic design and engineering judgments. During this period Bethlehem had physical possession and control over the vessels. After passing dock and sea trials, the vessels were delivered to plaintiff in 1962. On its Federal income tax return for calendar year 1962 plaintiff claimed an investment credit on the portion of the cost it paid in construction of the ships. The Internal Revenue Service disallowed the claim for investment credit respecting plaintiff's entire cost of the ships, contending that the portions of the ships constructed prior to December 31, 1961 were not eligible for investment credit under § 48(b)(1) of the Code. Plaintiff paid the tax deficiency, filed a claim for refund, and upon denial thereof filed a timely petition in this court. The main question is whether the vessels constitute property constructed "by the taxpayer" within the meaning of § 48(b)(1). In dealing with this case, the court assumes (as the Government argues) that §§ 48(b)(1) and 48(b)(2) apply to different categories and that if the property herein in issue falls within § 48(b)(1) plaintiff will receive only a limited credit. It is *held* (1) that on the facts of this case, plaintiff did not exercise suf-

Syllabus

ficient control over the construction of the vessels to bring the property within the provisions of § 48(b)(1) of Treas. Reg. 1.48–2(b)(1); (2) that plaintiff "acquired" the vessels after December 31, 1961 within the plain meaning of § 48(b)(2) and Treas. Reg. 1.48–2(b)(6); and (3) accordingly that plaintiff's vessels qualify for the investment credit under § 48(b)(2). Plaintiff is entitled to recover on its claim and the case is remanded to the trial judge for determination of the amount of its recovery.

Statutes; construction and operation; legislative intent; generally.

[1] The language of a statute itself is the best indication of the legislative intent. Congress often expresses its will in the customary meaning of the language it uses, and when the requirements of the statute are detailed and specific, they must be applied with precision.

Statutes ⇐ 188

Regulations of Executive Department; validity of regulation; statutory authority; generally.

[2] It is well established that a regulation which operates to create a rule out of harmony with the statute is a mere nullity.

Administrative Law and Procedure ⇐ 390

Taxes; Treasury Regulations; construction and operation; judicial review.

[3] Treasury Regulations should normally be given great weight on judicial review and must be upheld unless they cannot be interpreted in line with the statutory language they seek to explain.

Internal Revenue ⇐ 172

Taxes; Treasury Regulations; construction and operation; investment credit in depreciable property.

[4] Where Congress delegated specific authority to the Commissioner of Internal Revenue, in 26 U.S.C. § 38(b), to formulate regulations dealing with the investment credit, Treas. Reg. § 1.48–2(b)(1) is entitled to even more than the usual great weight accorded Treasury Regulations.

Internal Revenue ⇐ 157

Taxes; income tax; credits against tax; investment in depreciable property; control over property; constructed by taxpayer.

[5] Treas. Reg. § 1.48–2(b)(1) implies that the taxpayer must have control over new Section 38 property before it will be considered to be constructed, reconstructed or erected by him, but the scope of the term "specifications" therein is unclear. General or limited control over the contract plans and specifications is, in and of itself, insufficient to establish the degree of control necessary to find that the property was constructed "by the taxpayer." If taxpayer has such control over the details of the work that he is the maker of the property or constructs the property himself, then there is a sufficient nexus between the construction and the taxpayer for the construction to be "by the taxpayer" within the meaning of 26 U.S.C. § 48(b)

Syllabus

(1). The right of control is the most important factor to be considered in determining whether the work is done for the taxpayer "in accordance with his specifications."

Internal Revenue ⇐ 754

Taxes; income tax; credits against tax; investment in depreciable property; new Section 38 property.

[6] Plaintiff-steamship company did not exercise sufficient control over the construction of the four vessels in issue built under the construction-differential subsidy program to bring the property within the provisions of Sec. 48(b)(1) or Treas. Reg. 1.48–2(b)(1), where the Maritime Administration had the right to control the design specifications in every detail, it supervised the awarding of the construction contracts to B, it had the final word as to whether the specifications should be amended after contract award, it exercised a large degree of control over the contracts during all stages thereof, the ships were not built on plaintiff's property but at B's shipyard, at all material times B maintained physical possession and control over the ships, under the contract B was required to furnish the labor and materials, to perform all the work, and to deliver the ships at its own risk, and the vessels were built by B's employees from detailed "working plans" since the contract plans and specifications were insufficient to enable B's employees to construct the vessels.

Internal Revenue ⇐ 754

Taxes; income tax; credits against tax; investment in depreciable property; legislative intent.

[7] The language and background of Sec. 48(b) or its forerunner Sec. 167(c) do not support the contention that the "specifications" regulation (Treas. Reg. 1.48–2(b)(1)) distinguishes between custom-built property and items purchased off the shelf.

Internal Revenue ⇐ 754

Taxes; income tax; credits against tax; investment in depreciable property.

[8] While Sections 48(b)(1) and 48(b)(2) establish a cut-off date for the extension of investment credit, these sections must be read in conjunction with the general purpose for allowing such credit.

Internal Revenue ⇐ 754

Statutes; construction and operation; remedial legislation.

[9] It is generally recognized that remedial legislation should be construed liberally in order to effectuate its purpose. This is so with respect to the investment credit statute.

Internal Revenue ⇐ 754

Taxes; income tax; credits against tax; investment in depreciable property; new Section 38 property; date of acquisition.

[10] Where the involved contract required B, the construction contractor, to maintain full insurance coverage for the vessels under construction and to make actual tender of delivery to plaintiff-taxpayer of the completed vessels, where deliveries thereof together with required certifications were subsequent to December 31, 1961, plain-

tiff was not required until delivery to carry insurance, and it was not until after delivery and acceptance that plaintiff was able to place the vessels into service, having no right prior thereto to make any use of the vessels, plaintiff "acquired" the vessels after December 31, 1961 within the plain meaning of Sec. 48(b)(2) of the 1954 Code and Treas. Reg. 1.48-2(b)(6).

Internal Revenue ⇐ 754

Daniel M. Gribbon, attorney of record, for plaintiff. *Harris Weinstein*, *John D. Taurman*, *Covington & Burling*, of counsel.

Gilbert W. Rubloff, with whom was *Assistant Attorney General Scott P. Crampton*, for defendant.

Valentine Brookes filed a brief for Pacific Transport Co. and subsidiaries as *amicus curiae*. *Lawrence V. Brookes*, *Brookes, and Vogl*, of counsel.

Before COWEN, *Chief Judge*, DAVIS, SKELTON, NICHOLS, KASHIWA, KUNZIG, and BENNETT, *Judges*.

COWEN, *Chief Judge*, delivered the opinion of the court:

This case concerns the application of the investment tax credit provisions of the Internal Revenue Code of 1954, 26 U.S.C. § 38, 46–48, and the applicable regulations.[1] Plaintiff, Lykes Brothers Steamship Company, is a Louisiana corporation engaged in foreign commerce as a common carrier. It is the successor in interest to a prior corporation of the same name which operated the steamship business in 1962 (both corporations are referred to herein as plaintiff or taxpayer).

Plaintiff originally filed suit to recover an alleged overpayment of its Federal income tax for tax years 1958 through 1962. The claims for the years 1958 through 1961 were settled by the parties and dismissed by a stipulation filed with the court on February 8, 1974. The settlement also disposed of all issues raised by the taxpayer with respect to its tax liability for 1962, other than the single issue presented here for resolution.[2]

[1] All section references are to the Internal Revenue Code of 1954 unless otherwise noted. All statutory references in this opinion refer to applicable provisions in force in 1962.

[2] The remaining issue was previously presented to the court in 1971 on the parties' cross-motions for partial summary judgment. On June 14, 1971, the court denied both motions without prejudice and remanded the case to the trial judge for further proceedings on the application of Treasury Regulation § 1.48-2(b)(1). The case is again before the court, this time on defendant's exceptions to the trial judge's report.

The specific issue presently confronting us is whether certain vessels constitute property "the construction * * * of which is completed by the taxpayer after December 31, 1961" in accordance with section 48(b)(1) so that plaintiff is entitled only to a limited tax credit, or whether the investment credit for these ships should be measured by plaintiff's entire basis in the vessels pursuant to section 48(b)(2). Since we find that the vessels in question were not constructed "by the taxpayer" within the purview of section 48(b)(1) and instead were property "acquired after December 31, 1961" under section 48(b)(2), plaintiff was entitled to compute its investment tax credit based on the entire basis in the vessels. It may, therefore, recover on its claim.

There is little, if any, dispute as to the facts which are material to the resolution of the legal issues. Plaintiff operates a fleet of 21 vessels of the Gulf Pride class built under the construction-differential subsidy (CDS) program established by the Merchant Marine Act of 1936, ch. 858, §§ 501–09, 49 Stat. 1995, *as amended*, 46 U.S.C. §§ 1151–61. The CDS program has been administered at various times by the Federal Maritime Board (FMB) and the Maritime Administration (MARAD), and these agencies are sometimes collectively referred to herein as Maritime.[3] The program was designed to put American shipowners on equal footing with their foreign counterparts. The Government subsidy covers the difference between the amount it costs an American operator to get his ship built in the United States and what its foreign competitors would have to pay for a similar ship constructed by a foreign shipbuilder. At the time of the construction of the vessels in question, the subsidy normally totaled 50–55 percent of the actual construction costs.

In return for the payment of the construction subsidy, the Government exercises certain controls over the construction projects. Prior to the award of a construction subsidy, Government approval of the design of the new vessels and its determination, among other things, that such new vessels will aid in the promotion of the foreign commerce of the

[3] From May 1950 to August 1961, the FMB and MARAD jointly administered the CDS program. After 1961 MARAD administered the program alone. *See* 1950 Reorganization Plan No. 21, 64 Stat. 1273; 1961 Reorganization Plan No. 7, 75 Stat. 840.

United States are required. 46 U.S.C. § 1151(a). A Government finding that the vessels will be suitable for use in national defense, if required, is also a prerequisite to the subsidy award. 46 U.S.C. § 1151(b). Maritime maintains an Office of Ship Construction, which reviews the financial, economic, and technical data and presentations that are submitted by prospective shipowners in support of CDS applications. To discharge these functions, the Office contains a qualified and competent technical staff, including architects and engineering specialists.

This case involves four vessels, the *Leslie Lykes*, the *Brinton Lykes*, the *Shirley Lykes*, and the *Marjorie Lykes*, which were constructed under the CDS program. The circumstances leading to the construction of these vessels began in the early 1950's. At the start of the Korean War, the American Merchant Marine was composed primarily of ships built prior to or during Warld War II. Anticipating that the nation's fleet would soon be obsolete, Maritime began various programs to replace and modernize the fleet. In 1950, the Government began construction of a number of cargo vessels under the designation known as the "Mariner." These vessels had the largest cargo designation (C4) and were capable of surface speeds of 20 knots or more. After the ships were built by the Government, they were ultimately sold or leased. Shortly thereafter, Maritime's staff devised and prepared plans, specifications, and designs for a number of cargo vessels, including a designation called the "Clipper," which was to be the replacement for the medium-sized C2 and C3 class vessels.

Starting in 1954, Maritime asked plaintiff and other shippers to comment on the suitability of the "Mariner" and the "Clipper" as replacement vessels for their fleets. Plaintiff advised Maritime that neither design was satisfactory and countered with a suggestion for a more acceptable replacement vessel. Although the counterproposal was of the same general character as the Maritime "Clipper" proposal, it differed from it in nearly every respect except for the type of machinery and the number of passengers it could hold. The

major differences were in the beam, the horsepower, and the normal sea speed.[4] Plaintiff's initial proposal (as well as the ship finally constructed) was essentially a different vessel from that originally suggested by the Government.

While not rejecting plaintiff's proposal out of hand, Maritime informed plaintiff in mid-1955 that the data and specifications presented on the proposed vessel lacked the detail necessary for a decision on plaintiff's application for CDS. Maritime recommended that plaintiff obtain expert assistance for this purpose, whereupon plaintiff retained Gibbs and Cox as its naval architects to prepare the necessary design and specification work. In December 1955, plaintiff applied to Maritime for CDS and supported the application by an "outline specification" which had been prepared by Gibbs and Cox. Although these plans did not contain sufficient detail for bids or construction by a shipyard, sufficient data was provided to define the type and quality of ship suitable for plaintiff's needs and to enable Maritime to determine whether such a vessel was acceptable to it.

Plaintiff's proposed vessel had 8,500 horsepower, with a maximum sustained speed capability of 16.7 knots. In February 1956, Maritime and plaintiff met in Washington, D.C. to discuss this portion of plaintiff's proposal. At this meeting Maritime continued to adhere to its orginal 18-knot speed requirement but invited plaintiff to offer further submissions demonstrating that 18 knots was not a necessary requirement for plaintiff's particular trade. In November 1956, on the basis of facts submitted by plaintiff, a compromise was made in which Maritime agreed to a vessel with a 17.5-knot speed capacity and 9,000 horsepower. In a letter to plaintiff dated November 30, 1956, Maritime supplemented a recitation of the terms of the speed and horsepower agreement with the following:

> * * * [I]t is to be understood that the said action does not constitute approval of the basic design in its entirety,

[4] Plaintiff's main problem with the proposed replacements concerned their size and speed, which plaintiff felt were not suitable for its particular trade routes and type of business. Indeed, the "Clipper" was thought to be too wide for some of the port facilities used by plaintiff.

but is limited to the speed question. It remains incumbent upon you to have your design agent submit 12 sets of a complete preliminary design at the earliest possible date in order that the Office of Ship Construction and Repair may advise the Federal Maritime Board, from an engineering standpoint, with respect to the adequacy of the revised design on an overall basis in relation to the needs of the service, and so that the appropriate other Offices of the Maritime Administration may furnish their comments to the Federal Maritime Board with respect to said revised design.

After a compromise was reached concerning the speed and horsepower requirement, Maritime approved the application for CDS for five vessels, subject to further approval of the bidding or contract plans and specification to be developed by Gibbs and Cox. When the contract plans and specifications were submitted, Maritime critically reviewed them through various interdepartmental committees, and this examination generated almost 400 adverse comments. These comments were the subject of further discussions resulting in compromises which were ultimately approved by Maritime. Thereafter, the contract plans and specifications were used to invite construction bids from domestic shipyards, and Maritime determined the eligibility and responsibility of each bidder.

The construction contracts for the four ships involved in this case were awarded to the Bethlehem Steel Company and its subsidiary, the Bethlehem-Sparrows Point Shipyard, Inc. (hereinafter collectively referred to as Bethlehem) for construction in the shipyard located at Sparrows Point, Maryland. The vessels were constructed under two contracts: one entered into in 1958 (FMB–83), for the *Leslie Lykes*, and the other signed in 1960 (FMB–122) covering the other three vessels. Both contracts were three-party arrangements among the United States, represented by the Federal Maritime Board, taxpayer, and the shipbuilder. Under the contracts, Bethlehem undertook to furnish all labor and materials and to perform all work necessary to construct, complete and deliver (at its own risk and expense) the vessels called for

in the contract.[5] The contract "Specifications" approved by Maritime defined the vessel's performance characteristics and the type of materials to be used for construction. The "Plans" found in the approved contract set forth the approximate layout of the ships' hulls, decks, and compartments. However, the "Plans and Specifications" were insufficient to enable the shipyard employees actually to construct the vessels; instead, Bethlehem was required to rely on "working plans" in the actual building of the vessels. The "working plans" provided the specific directions to the shipyard's workmen for the task of physically assembling the vessels. While the "working plans" are a direct outgrowth of the contract plans and specifications, they often require basic design and engineering judgments. In this case, Bethlehem was able to use the detailed "working plans" that had been developed by the Ingalls shipyard in constructing a prior group of vessels in the Gulf Pride classification.[6] Bethlehem also selected the

[5] With certain immaterial exceptions, the contract signed in 1960 contained the same terms and conditions as the 1958 contract. Article I of the Special Provisions section of the 1960 contract provided:

"(a) The Contractor shall furnish all labor and material and shall perform all work necessary to construct, build, complete and deliver, at its own risk and expense, four (4) single screw vessels, MA Design C3–S–37b (in these Special Provisions called the 'Vessels'), in strict accordance with the Plans and Specifications referred to in Article II hereof, including National Defense Features, and will do everything required of the Contractor by this Contract (these Special Provisions and the General Provisions attached hereto and made a part hereof, and the Plans and Specifications), including the installation of any outfitting and equipment which the Plans and Specifications provide shall be furnished by the Owner and including the development of working plans, all for the consideration of Thirty Six Million Two Hundred Thirty Eight Thousand Four Hundred Dollars ($36,238,400.00) (herein called the 'Contract Price'), together with such additions and subject to such deductions as are herein provided."

[6] Plaintiff's first group of five Gulf Pride class vessels was constructed by Ingalls Shipbuilding Corporation and bore MARAD design designation C3–S–37a. In this designation, "C" stands for cargo vessel, "3" is an indication of length, "S" signifies steam propulsion. "37" is the number in the series of C3–S designs that have received MARAD designations, and the small letter "a" permits differentiation among series of the C3–S–37 design. The second group of four Gulf Pride class vessels, which included the *Leslie Lykes*, was constructed by Bethlehem. The design of these vessels was the same as that for the first five vessels, and they were also designated C3–S–37a. The third group of four Gulf Pride class vessels, which included the *Brinton Lykes*, the *Shirley Lykes*, and the *Marjorie Lykes*, was constructed in the same Bethlehem shipyard as the second group of vessels. Because of an increase in horsepower, the design of the third group differed somewhat from that of the prior nine vessels and was designated by Maritime as C3–S–37b.

suppliers for the materials to be used in the ships' construction.

In sum, the detailed design, engineering, and construction work was left to the employees of Bethlehem. Throughout the construction process, the vessels were in the physical possession of Bethlehem and its employees. During the construction period, plaintiff had no right to control or make any use whatsoever of the four vessels for any purpose.

After construction and prior to delivery to plaintiff, each of the vessels underwent dock and sea trials conducted by the Maritime Administration Trial and Guarantee Survey Board, which determined whether the vessel conformed to the requirements of the construction contract.[7] The vessels could not be delivered to plaintiff without having passed these trials. The four vessels at issue were actually delivered and made available to plaintiff for use in its business at various times during 1962.

On its Federal income tax return for calendar year 1962, plaintiff claimed an investment credit in the amount of $1,080,128.99. A portion of this claimed credit was attributable to plaintiff's share of the cost of construction of the four vessels. On January 13, 1967, the Commissioner of Internal Revenue disallowed plaintiff's claim for full investment credit with respect to plaintiff's entire cost of these vessels, relying in part on the ground that the portions of the vessels constructed prior to December 31, 1961, were not eligible for investment credit under section 48(b)(1) of the Code.

After paying the income tax deficiency relating to this claim, plaintiff, on March 24, 1969, filed a timely claim for refund of Federal income taxes for calendar year 1962 in the amount of $998,290.50, plus interest, disputing the partial disallowance of investment credit for these vessels as well as other items. Plaintiff's claim for refund was denied in full by a statutory notice of disallowance dated May 1, 1969, and plaintiff timely filed its petition in this court.

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[7] At the same time, the United States Coast Guard, the American Bureau of Shipping, the United States Public Health Service and others conducted detailed inspections and tests for safety, seaworthiness, and sanitation.

I

The investment tax credit provisions were initially added to the 1954 Code by section 2 of the Revenue Act of 1962, Pub. L. No. 87–834, 76 Stat. 962. This Act authorized the allowance of a tax credit for investment in certain depreciable property. The vessels in this case are property within this category. *See* § 48(a)(2)(B)(iii). The 1962 Act authorized the taxpayer to claim a credit equal to seven percent of the basis of a "qualified investment." *See* § 46(a)(1). In section 46(c)(1)(A) "qualified investment" was defined, in part, as the "applicable percentage of the basis of each new section 38 property (as defined in section 48(b)) placed in service by the taxpayer during such taxable year." We are concerned here with the transitional rules in section 48(b) relating to the extent to which particular items could be treated as "new section 38 property" and hence eligible for credit. Section 48(b) provides:

> (b) NEW SECTION 38 PROPERTY.—For purposes of this subpart, the term "new section 38 property" means section 38 property—
>
> (1) the construction, reconstruction, or erection of which is completed by the taxpayer after December 31, 1961, or
>
> (2) acquired after December 31, 1961, if the original use of such property commences with the taxpayer and commences after such date.
>
> In applying section 46(c)(1)(A) in the case of property described in paragraph (1), there shall be taken into account only that portion of the basis which is properly attributable to construction, reconstruction, or erection after December 31, 1961.

Under this section, the credits for investments in property described in category (1) are limited to that portion of the taxpayer's basis in the property that is attributable to costs during the period after the statutory cut-off date, December 31, 1961. There is no such limitation for credit claimed on property classified in category (2).

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In interpreting section 48(b), Treasury Regulations section 1.48–2(b) provides in part:

> (1) Property is considered as constructed, reconstructed, or erected by the taxpayer if the work is done for him in accordance with his specifications.
>
> * * * * *
>
> (6) Property shall be deemed to be acquired when reduced to physical possession, or control.

Plaintiff rests its case primarily on the argument that it is entitled to the tax credit measured on the entire basis of the four vessels in issue because these vessels were "acquired" after December 31, 1961, in accordance with section 48(b)(2) of the Code and Treasury Regulation section 1.48–2(b)(6). Plaintiff argues that the availability of the full credit under section 48(b)(2) does not depend on the unavailability of the restricted credit under section 48(b)(1). In this regard, plaintiff emphasizes that section 48(b)(1) was designed to serve a limited purpose of allowing partial credit in situations which were not already subject to section 48(b)(2); and that even if the vessels in issue could be classified within both sections 48(b)(1) and 48(b)(2), plaintiff is entitled to the benefits of section 48(b)(2). In addition, plaintiff contends that the four vessels in issue were not constructed "by the taxpayer" within the meaning of section 48(b)(1).

Defendant, for its part, maintains that the vessels were constructed "by the taxpayer" under section 48(b)(1) of the Code, because the vessels were built for plaintiff in accordance with its plans and specifications within the meaning of Treasury Regulation section 1.48–2(b)(1). The defendant also raises what has been termed the "mutual exclusivity" argument, that is, that sections 48(b)(1) and 48(b)(2) were intended to apply to different types of situations. Defendant's argument follows that since the vessels in question were constructed "by the taxpayer," they are not "acquired" property within the meaning of section 48(b)(2).

Defendant's position ultimately rests on its contention that the vessels were constructed "by the taxpayer" under section 48(b)(1). Since we do not agree with this argument, we need not deal with two alternative arguments of the parties. Solely for the purpose of deciding this case, we assume (as the Gov-

ernment argues) that section 48(b)(1) and section 48(b)(2) apply to different categories and that if the property in this case falls within section 48(b)(1), plaintiff will receive only a limited credit.[8]

II

The main question is whether the four vessels in issue constitute property constructed "by the taxpayer" within the meaning of section 48(b)(1). Giving the words "by the taxpayer" their ordinary meaning, plaintiff would have to be the maker of the property or the one with control over the details of the construction of the vessels before section 48(b)(1) would apply. The legislative history of this section does not specifically define the phrase "by the taxpayer," and the legislative background does not contain anything which would lead us to depart from the plain meaning of the statute.

In implementing the credit, Congress chose the December 31, 1961, cut-off date and adopted basically the same transition rules which were added to the Internal Revenue Code in 1954 in section 167(c) to deal with the application of the newly liberalized depreciation provisions. *See* H.R. Rep. No. 1447, 87th Cong. 2d Sess. 10 (1962); S. Rep. No. 1881, 87th Cong. 2d Sess. 15 (1962). But the legislative history of section 167(c),[9] like that of section 48(b), does

[8] While the court order of June 14, 1971, remanded the case to the trial judge for a determination of whether the plans and specifications for the vessels were the product of taxpayer's employees and agents within the meaning of Treasury Regulation 1.48-2(b)(1), the court is not limited to this narrow issue in determining whether the case falls within section 48(b)(1).

[9] Like the investment credit, the liberalized depreciation methods introduced into the Code in 1954 were designed to stimulate economic growth. H.R. Rep. No. 1337, 83d Cong., 2d Sess. 24 (1954). The House version of the 1954 transition rules drew the distinction between "acquired" property "the construction, reconstruction, or erection of which is completed after December 31, 1953." H.R. 8300, 83d Cong., 2d Sess. 41 (1954). The House committee interpreted this latter provision as applying to property constructed by the taxpayer. *See* H.R. Rep. No. 1337, *supra* at 23. In discussing the transition rules, the House committee proposed to limit the application of the new depreciation methods to new assets "acquired" after the effective date of the bill primarily as a means of minimizing revenue losses and obtaining maximum incentive effect. *Id.* As for the property in construction by the taxpayer at the cut-off date, the House committee does not explain the limitation, and it is interesting that the Senate took exception to this provision because it discriminated against the taxpayer who "conducted the construction himself" and because it created an administrative problem

(Continued)

not provide much aid in defining the scope of section 48(b). The language of the statute itself is the best indication of the legislative intent. Congress often expresses its will in the customary meaning of the language it uses, and when "[t]he requirements of the [statute] are detailed and specific, * * * [they] must be applied with precision." *Commissioner* v. *Gordon*, 391 U.S. 83, 91–92 (1968); *see, e.g.*, *Braunstein* v. *Commissioner*, 374 U.S. 65, 69–73 (1963); *Hanover Bank* v. *Commissioner*, 369 U.S. 672, 687 (1962); *First Nat'l Bank of Chicago* v. *United States*, 69 Ct. Cl. 312, 325, 38 F. 2d 925, 931 (1930), *aff'd*, 283 U.S. 142 (1931).

III

Defendant bases its interpretation of section 48(b)(1) largely upon Treasury Regulation 1.48–2(b)(1), which provides that "[p]roperty is considered as constructed * * * by the taxpayer if the work is done for him in accordance with his specifications." Basically, defendant argues that the vessels were built exclusively for the taxpayer in accordance with contract plans and specifications which were attributable to plaintiff, and consequently, under the regulation, the vessels were constructed "by the taxpayer." We disagree.

This regulation seeks to provide a standard for determining the extent to which property constructed *for* the taxpayer will be considered to have been constructed *by* him within the meaning of section 48(b)(1). It is significant that the statute itself does not include property constructed *for* the

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(Continued)
in determining the portion of the cost incurred after the cut-off date. S. Rep. No. 1622, 83d Cong., 2d Sess. 28–29 (1954). With the matter thus in dispute, the Conference committee agreed to accept the limitation in the House bill, restricting the new methods to that portion of the basis of property attributable to the construction, reconstruction or erection after December 31, 1953. H.R. Rep. No. 2543, 83d Cong., 2d Sess. 29 (1954). The Conference committee report does not indicate why the House version was accepted, but it appears that the Conference committee considered and rejected the Senate position.

Although the phrase "by the taxpayer" was not included in section 167(c)(1), the Treasury Regulations eliminated the possibility of giving this section a broad interpretation by limiting it to construction, reconstruction, or erection by the taxpayer. *See* Treas. Reg. § 1.167(c)–1(a). This regulation also provided that the property would be considered constructed by the taxpayer if the work was done for him in accordance with his specifications. *Id.* This latter provision goes beyond the Congressional discussions preceding the enactment of section 167(c).

taxpayer—it merely speaks of the construction, reconstruction, or erection of property *by* the taxpayer. The implication that the word "by" is not intended to mean "for" is strengthened by looking at the larger statutory phrase "which is completed by the taxpayer." The words "completed by" connote an active participation by the taxpayer in the completion of construction and hence in the construction itself. Thus, taken literally, the regulation could expand the coverage of section 48(b)(1) beyond its statutory language, and it is well established that a regulation which "operates to create a rule out of harmony with the statute, is a mere nullity." *Manhattan Gen. Equip Co.* v. *Commissioner*, 297 U.S. 129, 134 (1936).

However, we recognize that Treasury Regulations should normally be given great weight in our determinations and must be upheld unless they cannot be interpreted in line with the statutory language they seek to explain. *Commissioner* v. *South Texas Lumber Co.*, 333 U.S. 496, 501 (1948); *Fawcus Mach. Co.* v. *United States*, 282 U.S. 375, 378 (1931); *Wills* v. *Commissioner*, 411 F. 2d 537, 543 n. 1 (9th Cir. 1969). Furthermore, we are presently confronted with a situation where Congress delegated specific authority to the Commissioner, in section 38(b), to formulate regulations dealing with the investment credit. As we stated in *Coca-Cola Bottling Co.* v. *United States*, 203 Ct. Cl. 18, 26, 487 F. 2d 528, 532 (1973):

> [S]ection 1.48–1(b) of the Treasury Regulations is entitled to even more than the usual great weight accorded Treasury Regulations * * *.

From our study of the regulation presently in issue, we find that it is susceptible to a construction consistent with the terms of the statute. We, therefore, need not find the regulation invalid in whole or in part.

The regulation implies that the taxpayer must have control over the project before it will be considered to be constructed, reconstructed, or erected by him, but the scope of the term "specifications" is unclear. General or limited control over the contract plans and specifications is, in and of itself, insufficient to establish the degree of control necessary to find that the property was constructed "by the taxpayer."

If plaintiff has such control over the details of the work that it is the maker of the property, or constructs the property itself, then there is a sufficient nexus between the construction and the taxpayer for the construction to be "by the taxpayer" within the meaning of section 48(b)(1).

This is not the first time this regulation has been interpreted by the courts. In *Public Service Co. of New Mexico* v. *United States*, 431 F. 2d 980 (10th Cir. 1970), the Tenth Circuit was faced with a similar problem of determining whether the restricted credit provisions of section 48(b)(1) applied. In that case, the taxpayer, a utility company, was engaged in the business of furnishing electrical energy and water. In 1960, the taxpayer entered into a contract with Stearns-Rogers Manufacturing Company for the construction of a plant to contain a 66,000-kilowatt hydrogen-cooled turbine generator. The contract provided that Stearns-Rogers would supply "the required engineering design, drafting, accounting, purchasing and expediting of materials and the furnishing of supervision, labor, and other requirements necessary for the construction of the 66,000 kilowatt No. 3 Unit." 431 F. 2d at 982. The turbine-generator was to be constructed on taxpayer's property, and Public Service specified the technical data and performance expectations required from the turbine-generator. The new generator plant was not tested until after December 31, 1961, and Public Service did not gain actual control of the plant until mid-1962.

The Internal Revenue Service, as in the present case, ruled that section 48(b)(1) applied to the transaction. In reversing this ruling, the court stated:

> *Right of control is the touchstone in this suit.* 26 C.F.R. § 1.48–2(b)(1) states: "Property is considered as constructed, reconstructed, or erected by the taxpayer if the work is done for him in accordance with his specifications." It is apparent that the purpose of this regulation is to distinguish between work done by independent contractors and mere employees. *With that dichotomy in mind, we note that the regulation would defeat the investment credit if "specifications" refers to the control and supervision which every owner has the right to exercise over the general work.*
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> * * * * *

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> It would be patently absurd for a utility company to only generally describe the yet-to-be constructed plant and expect the contractor to fill in all the technical data and performance details. *Manifestly, Public Service was free to enumerate technical specifications for the power plant and at the same time remain free to claim an investment credit on the entire cost of acquisition.* Only if it had *authoritative control* with respect to the manner and means in which and by which the details of the work were to be performed would the Company be limited to a credit on the basis of construction costs after December 31, 1961. 431 F. 2d at 983. [Emphasis added.]

We agree with the Tenth Circuit that the right of control is the most important factor to be considered in determining whether the work is done for the taxpayer "in accordance with his specifications." However, we need not go so far as to hold that the taxpayer is entitled to recover upon a finding, without more, that the Bethlehem Steel Company filled the role of an independent contractor in the construction of the Lykes Bros. ships. There are important factual differences between the cases. In *Public Service Company of New Mexico*, the construction agreement was a two-party contract between Public Service and Stearns-Rogers. The taxpayer owned the land upon which the plant was constructed. It purchased the major plant components from a supplier and furnished them to a contractor, and the taxpayer also enumerated certain technical specifications for the power plant. There was no third party who had the right to control any portion of the design or construction.

By contrast, the case before us involves three contracting parties: the plaintiff, the Government represented by the Federal Maritime Board, and the contractor. The question as to whether plaintiff had the necessary control over the construction of the four vessels must, to a very large extent, be answered by the degree of supervision and control which the Government was authorized to exercise from the initiation of the project until the completion and delivery of the vessels. This significant factor was not present in the *Public Service Company* case.

IV

On the facts of this case, plaintiff did not exercise sufficient control over the contruction of the vessels to bring the property within the provisions of section 48(b)(1) or Treasury Regulation 1.48–2(b)(1). While the parties dispute whether the contract plans and specifications can be deemed to belong to the taxpayer for purposes of determining the investment credit, it is clear that in accordance with the requirements of the construction-differential subsidy program, the Government exercised a large degree of control over the contract at all stages from the beginning to the final completion of the project. Maritime had the right to control the design specifications in every detail.[10] Maritime examined the "outline specification" submitted with the application for subsidy in 1955 and found it lacking in the horsepower requirement. After negotiations, a compromise was reached, increasing the horsepower of the vessel from plaintiff's suggested 8,500 to 9,000. When plaintiff later submitted the proposed contract plans and specifications, Maritime "critically reviewed" them, and this detailed examination generated almost 400 adverse comments. The comments ranged from the location of the captain's quarters to the size of bolts for the ventilation system. After additional negotiations, the contract plans and specifications were approved by Maritime. Maritime supervised the awarding of the construction contracts. Under the terms of the contracts, the Federal Maritime Board had the final word (short of resort to the courts) as to whether the specifications should be amended after the contracts were awarded. The Maritime Administration Trial and Guarantee Survey Board determined whether the vessels were built consistently with the contract requirements. Thus, plaintiff's right of control over the construction of the vessels was remarkably less than that of an ordinary buyer who contracts to have a building or a machine constructed by another company.

It is not enough to say that the vessels were designed to a large extent to make them satisfactory for plaintiff's com-

[10] *Cf. Seas Shipping Co.*, 1 T.C. 30, 39 (1942), *dismissed on appeal (nol. pros.)*, (2d Cir. 1944).

mercial needs. Nor is it important that Maritime did not change a great percentage of the proposed contract plans and specifications submitted to it. Defendant concedes that Maritime had the authority to condition the grant of CDS upon the building of a vessel entirely different from that desired and requested by the applicant, and Maritime exercised that control in numerous instances.

Maritime's control was far greater than that which prevails in a situation where a construction project has to conform to few minor requirements of a regulatory body.

In addition to the Government's control over the project, there are other factors which demonstrate plaintiff's lack of control of Bethlehem's construction operation. The ships were not built on plaintiff's property. They were constructed in Bethlehem's shipyard at Sparrows Point, Maryland, far removed from Louisiana, plaintiff's state of incorporation. At all material times during construction of the vessels, Bethlehem maintained physical possession and control over the vessels.

Bethlehem's relation to the other contracting parties was that of an independent contractor. Under the construction contract, Bethlehem was required to furnish the labor and materials, to perform all the work, and to deliver the vessels at its own risk.

The contract plans and specifications, which plaintiff participated in formulating, were insufficient to enable the shipyard employees to construct the vessels. The vessels were built by the shipyard's employees from detailed working plans. While Bethlehem had a contractual obligation to prepare such working plans, it was able to utilize the working plans developed by the Ingalls Shipyard for construction of a prior group of Gulf Pride vessels.

The contract required Bethlehem to submit the working plans to plaintiff and the Federal Maritime Board for approval, and until approved, all such work would be at the shipyard's own risk. Also, the working plans were tailored to the contract requirements, and inspectors representing Maritime, Gibbs and Cox, and plaintiff were present at the construction site during the construction of the vessel. While

these two provisions tend to support defendant's position, they must be evaluated against many other factors, including the Government's right of control and Bethlehem's overall responsibility for construction of the vessels. When so considered, we think the balance tilts in favor of a conclusion that the vessels were not constructed "by the taxpayer" within the meaning of section 48(b)(1) or "in accordance with [its] specifications," as that phrase in the regulations should be interpreted.

V

One of defendant's principal contentions is that the "specifications" regulation distinguishes between items which are built to order according to the taxpayer's individual requirements ("custom-built") and property which can be supplied out of ordinary stock or "off the shelf." To support this distinction, defendant argues that the limitation "by the taxpayer" was used because of the administrative problem which could arise in determining the construction status on the cut-off date of property manufactured or built by someone other than the taxpayer, such as in the case of a manufacturer of standard items which can be purchased off-the-shelf or from a catalog. Defendant concludes that the "specifications" regulation properly treats custom-built property as that constructed "by the taxpayer," and excludes off-the-shelf items.

The weakness of this argument lies in the fact that there is no support for it in the language or background of section 48(b) or in its forerunner, section 167(c). The examples given in the committee reports and in the Treasury Regulations do not suggest this distinction. If Congress intended to make such a distinction, there is no indication of it. The fact that the Senate committee, when considering the House version of section 167(c), noted that the House limitation for construction in process on January 1, 1954, created a difficult administrative problem in determining the portion of the cost incurred after December 31, 1953, (S. Rep. No. 1622, 83d Cong., 2d Sess. 29 (1954)), does not show that the limitation to construction by the taxpayer was made to simplify the administrative burden.

Moreover, in the same report, the Senate committee noted that the limitation for property constructed by the taxpayer would discriminate against the taxpayer who "conducted the construction himself" as compared with a taxpayer who purchased a "new building" after December 31, 1953. Thus, the Senate committee did not treat the House bill as one distinguishing between custom-built and off-the-shelf items; rather the committee recognized it as a distinction based on who performed the work.

In rejecting defendant's contentions, we are influenced by the manifest purpose of Congress to stimulate economic development by means of the investment credit. While sections 48(b)(1) and 48(b)(2) establish a cut-off date for the extension of investment credit, these sections must be read in conjunction with the general purpose for allowing investment credit. The credit was designed to encourage the modernization and expansion of the Nation's production facilities by immediately reducing income taxes, with the result, *inter alia*, of increasing the capital funds available for investment. It was hoped that the credit would improve the country's economic potential, increase job opportunities, and better the country's competitive position in the world economy. *See* H.R. Rep. No. 1447, 87th Cong., 2d Sess. 8 (1962); S. Rep. No. 1881, 87th Cong., 2d Sess. 11 (1962). In view of this objective, we do not think that Congress intended for the investment credit provisions, including the transitional rules, to be applied as restrictively as defendant would apply them in this case. It is generally recognized that remedial legislation should be construed liberally in order to effectuate its purpose. *See, e.g., Tcherepnin* v. *Knight*, 389 U.S. 332, 336 (1967); *Piedmont & N. Ry. Co.* v. *Interstate Commerce Comm'n*, 286 U.S. 299, 311–12 (1932). In applying various sections of the investment credit statute, this court and other courts have noted that the Act should be interpreted liberally in keeping with its purposes, *Alabama Displays, Inc.* v. *United States*, 205 Ct. Cl. 716, 507 F. 2d 844 (1974); *Minot Fed. Sav. & Loan* v. *United States*, 435 F. 2d 1368, 1372 (8th Cir. 1970); *Northville Dock Corp.*, 52 T.C. 68, 73 (1969), and this case is no exception.

The Government's position that section 48(b)(1) applies to all custom-made items would reduce the economic effect of the credit during transitional years. Such an interpretation would give widespread application to the limitation of the tax credit on property which defendant would classify under section 48(b)(1) and thereby reduce the amount of credit which otherwise might be available to taxpayers under section 48(b)(2). Furthermore, because custom-built items are normally more expensive than off-the-shelf items, the Government's interpretation would have the effect of restricting the credit available for the expensive custom-built items, while allowing it on the cheaper items. We believe that our reading of the phrase "by the taxpayer" in section 48(b)(1) is more consistent with the statutory objective of encouraging economic development than the interpretation proposed by defendant.

VI

Finally, we must determine whether the property at issue was "acquired" by the plaintiff after December 31, 1961, pursuant to section 48(b)(2). In this regard, we are guided by Treasury Regulation 1.48–2(b)(6), which states that "Property shall be deemed to be acquired when reduced to physical possession, or control." Our inquiry regarding the time of physical possession is simplified in this case, since Bethlehem was required under the contract to make an actual tender of delivery of the completed vessels to plaintiff.[11] It is established that the actual delivery dates of the four vessels were as follows: the *Leslie Lykes*, February 2, 1962;[12] the *Brinton Lykes*, June 29, 1962; the *Shirley Lykes*, August 31, 1962; and the *Marjorie Lykes*, November 16, 1962. On the delivery

[11] Article I(b) of the Special Provisions section of the 1958 contract (FMB–83), which is substantially the same as Article I(b) in the contract signed in 1960, provided in pertinent part:

"Upon completion of the work * * * and after passing the tests provided in the Plans and Specifications and this contract, the Vessels as completed shall be delivered to the Owner alongside a safe and accessible pier at the Shipyard * * * free and clear of all liens * * *. Upon such delivery, the Owner shall give the Contractor a receipt for the Vessels and shall * * * remove or cause the Vessels to be removed from the Shipyard."

[12] The original delivery date scheduled for the *Leslie Lykes* in the contract was October 17, 1961, but the ship was actually delivered in 1962.

dates, the certifying documents for each vessel issued by the Coast Guard, the American Bureau of Shipping, the Public Health Service, and others were delivered to plaintiff.

In addition, plaintiff did not act in a manner consistent with possession or control of the vessels until after the vessels were actually delivered. It was not until after delivery and acceptance that plaintiff was able to place the vessels into service, for prior to such delivery, plaintiff had no right to make any use of the ships whatsoever.[13] For example, plaintiff placed its crews on board the ships for the first time after delivery, when the vessels were removed from the shipyard as required by the contract. Prior to delivery, the vessels could be manned only by personnel employed by Bethlehem. Similarly, plaintiff was first obligated to buy insurance coverage for the vessels after delivery. Prior thereto, while the vessels were in the possession and under the control of Bethlehem, the shipyard was obligated, under the contract, to maintain full insurance coverage for the ships. Thus, by taking delivery of the vessels during 1962 and by placing the new vessels in service for the first time thereafter, plaintiff "acquired" the vessels after December 31, 1961, within the plain meaning of section 48(b)(2) and Treasury Regulation 1.48-2(b)(6).

CONCLUSION

Since plaintiff's vessels qualify for the investment credit under section 48(b)(2), and not under section 48(b)(1), plaintiff is entitled to recover on its claim, and we remand the case to the trial judge for a determination of the amount of its recovery pursuant to Rule 131(c).

[13] Courts previously have held that taxpayers "acquired" property for investment credit purposes when the property was placed in operating condition by the manufacturer, notwithstanding that they had taken possession of the finished components at an earlier time. In *Forest City Publishing Co. v. United States*, 72-1 U.S.T.C. para. 9143 (N.D. Ohio 1971), the court held that the taxpayer "acquired" a printing press only after it was assembled by the manufacturer and placed in service during 1962 rather than in 1961 when the unassembled components were delivered to the tax payer's premises. *See also The LTV Corp.*, 63 T.C. 39 (1974); *Madison Newspapers, Inc.*, 47 T.C. 630 (1967).

Syllabus

513 F. 2d 1355

PACIFIC FAR EAST LINE, INC.

v.

THE UNITED STATES

[No. 214–70. Decided March 19, 1975]

ON PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR PARTIAL SUMMARY JUDGMENT

Taxes; investment credit; construction-differential subsidy program of the Merchant Marine Act of 1936.—This case concerns the application of the investment tax credit provisions of the Internal Revenue Code of 1954 and applicable regulations. As in *Lykes Bros. S.S. Co.* v. *United States*, decided this day, plaintiff claims 7% investment credit on its entire basis in two ships constructed under the construction-differential subsidy (CDS) program of the Merchant Marine Act of 1936. Pursuant to its interpretation of 26 U.S.C. § 48(b), the Internal Revenue Service restricted plaintiff's credit to that portion (15.3%) of its total basis in the vessels attributable to post-1961 construction costs. In *Lykes Bros.* the court concluded that if taxpayer has such control over the details of the work that it is the "maker" of the property or constructs the property itself, then there is a sufficient nexus between the construction and taxpayer for the construction to be "by the taxpayer" within the meaning of § 48(b)(1). The opinion herein is confined to the application of that test to the facts of this case. In 1959, plaintiff entered into a three-party agreement with the United States (Maritime) and Bethlehem Steel Company for the latter to build two ships in its San Francisco shipyards, plaintiff using § 504 of the Merchant Marine Act to finance construction. Since the ships were built under the CDS program, approval by Maritime of the construction plans was required. According to an uncontested affidavit by plaintiff's witness, a naval architectural consultant formerly employed by Maritime, specifications were directly based on the "Mariner" design developed by Maritime and Bethlehem some years before and plaintiff merely requested Maritime to approve certain minor modifications so that the completed vessel would more nearly meet its commercial needs. It is *held* that here plaintiff has shown, even more conclusively than was done in *Lykes Bros.* that it did not have the right to exercise the degree of control necessary to place the construction of the property within the provisions of § 48(b)(1). It is also *held* that the vessels were "acquired" by plaintiff after December 31, 1961, pursuant to § 48(b)(2). Since the vessels do not fall within the provisions of § 48(b)(1) and do qualify for treatment under § 48(b)(2), plaintiff should have been allowed to use its entire basis in the construction of the ships in determining the investment credit for the tax years in question

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(1962, 1963 and 1964). Plaintiff's motion for partial summary judgment is granted, defendant's cross-motion is denied, and the case is remanded to the trial judge for determination of the remaining issues in the case.

Taxes; income tax; credits against tax; investment in depreciable property; control over property; constructed by taxpayer.

[1] Property is constructed "by the taxpayer" under 26 U.S.C. § 48(b)(1) only if the taxpayer possesses the right to control the details of construction of the property itself. The question whether the property is constructed in accordance with taxpayer's specifications, within the meaning of Treas. Reg. 1.48–2(b)(1) is to be determined largely by the extent of the Government's supervision and control (*Lykes Bros. S.S. Co.* v. *United States*, *ante* at 354).

Internal Revenue ⇐ 754

Pleading and practice; summary judgment; affidavits; issue of fact, how shown.

[2] Under this court's Rule 101(f) mere formal denials or general allegations unsupported by a counter affidavit setting forth specific facts are inadequate to preserve a dispute of fact for determination by trial.

Courts ⇐ 470

Pleading and practice; summary judgment; affidavits; issue of fact, how shown.

[3] Here defendant failed to supply an affidavit countering plaintiff's affidavit attesting that the design for the ships in issue was developed by Maritime some years before their construction and that plaintiff merely requested Maritime to approve minor modifications to meet plaintiff's commercial needs. Instead, defendant merely contended that the vessel modifications *may* have been so extensive as to change the overall style of the ships. Since defendant had an obligation to come forward and rebut the affidavit, the only direct evidence on this point, the court must accept the truth of the statements in the affidavit in determining the degree of Government and plaintiff control over the details of the construction of the ships.

Courts ⇐ 470

Taxes; income tax; credits against tax; investment in depreciable property; new Section 38 property.

[4] Plaintiff-steamship company did not exercise sufficient control over the construction of the vessels in issue to bring the property within the provisions of § 48(b)(1) or Treas. Reg. 1.48–2(b)(1), where the day-to-day construction of the vessels was accomplished by B, an independent contractor. B had exclusive dominion over the worksite, had substantial design responsibilities with respect to the vessels and was required to develop detailed working plans to aid in the actual construction. The contract explicitly provided that the workmen and employees be employees of B or its subcontractors and not employees of plaintiff or the Government. B was responsible for selecting all subcontractors, vendors and suppliers

for the project and the entire risk of loss fell upon B during construction and until delivery. B was responsible for manning the vessels during tests and sea trials and for securing all necessary certifications required by Federal state and local law.

Internal Revenue ⇐ 754

Taxes; income tax; credits against tax; investment in depreciable property; new Section 38 property; date of acquisition.

[5] Where the Certificates of Delivery establish that the ships in issue were reduced to taxpayer's physical possession or control in 1962 and that original use of the ships occurred in 1962 after plaintiff took control thereof on their respective dates of delivery, plaintiff "acquired" the vessels after December 31, 1961, within the plain meaning of § 48(b)(2) and Treas. Reg. 1.48-2(b)(6).

Internal Revenue ⇐ 754

Mark P. Schlefer, attorney of record, for plaintiff. *J. Franklin Fort, T.S.L. Perlman, Leonard Egan, Stephen T. Owen, and Kominers, Fort, Schlefer & Boyer*, of counsel.

Gilbert W. Rubloff, with whom was *Assistant Attorney General Scott P. Crampton*, for defendant. *Theodore D. Peyser*, of counsel.

Valentine Brookes filed a brief for Pacific Transport Co. and subsidiaries as *amicus curiae*. *Lawrence V. Brookes, Brookes, Brookes and Vogl*, of counsel.

Before COWEN, *Chief Judge*, DAVIS, SKELTON, NICHOLS, KASHIWA, KUNZIG, and BENNETT, *Judges*.

COWEN, *Chief Judge*, delivered the opinion of the court:

This case is presented on cross motions for partial summary judgment and raises only one of three primary questions found in plaintiff's petition. The basic issue before us here is identical to the one found in its companion case of *Lykes Bros. Steamship Co.* v. *United States*, *ante* at 354. As in *Lykes Bros. Steamship Co.*, we have a taxpayer who claims the seven percent investment credit on its entire basis in certain vessels. As in *Lykes Bros. Steamship Co.*, taxpayer has been allowed only a restricted credit, based on its post-1961 costs, because of defendant's interpretation of section 48(b) of the Internal Revenue Code of 1954.[1] Since our decision in *Lykes Bros. Steamship Co.* discusses in detail the proper criteria for determining whether

[1] All section references in this opinion are to the Internal Revenue Code of 1954, unless otherwise noted. All statutory references refer to applicable provisions in force in 1962.

property has been constructed "by the taxpayer" under section 48(b)(1) and the applicable Treasury regulations, our opinion here will be confined to the application of that test to the facts of this case. For the reasons stated below, we grant plaintiff's motion for partial summary judgment. Findings on the amount of plaintiff's recovery are reserved pending determination of the remaining portions of plaintiff's petition.

Pacific Far East Line, Inc. is a Delaware corporation engaged in business as a common carrier by water in the foreign commerce of the United States. In 1962, plaintiff accepted delivery of two new vessels, the *Philippine Bear* and the *China Bear*, for use in its transpacific common carrier service between ports in California and those in the Far East. The two vessels were constructed, with aid from the construction-differential subsidy program (CDS), pursuant to a single contract dated September 22, 1959 (FMB–100). Plaintiff financed its portion of the costs of the vessels in accordance with Section 504 of the Merchant Marine Act of 1936, as amended.[2] 46 U.S.C. § 1154 (1964). The 1959 agreement was entered into by the taxpayer, the United States (represented by the Federal Maritime Board),[3] and Bethlehem Steel Company (Bethlehem) for construction of two vessels at Bethlehem's shipyards in San Francisco, Calif. Since the ships were built under the CDS program, approval by Maritime of the construction plans was required. Pursuant to Article I of the Special Provisions of the contract, Bethlehem promised it would perform all the work necessary to construct the vessels "in strict accordance with the Plans and Specifications," which were attached to and made part of the agreement. The ships were delivered by Bethlehem to plaintiff only after completion of all construction work, and after the vessels had passed the many tests, trials and inspections mandated by the contract.

[2] Plaintiff had acquired its fleet of standard dry cargo vessels previously by straight purchase from the Government of Government-built Mariner ships. It was only because the Government's inventory was exhausted that plaintiff contracted directly with Bethlehem under section 504 to have the vessels built.

[3] The CDS program has been administered at various times by the Federal Maritime Board and the Maritime Administration, and these agencies are referred to in this opinion collectively as "Maritime".

While the foregoing facts are similar to those found in *Lykes Bros. Steamship Co.*, our present case differs somewhat in the manner in which the contract Plans and Specifications were developed, and the factual background covering this area requires a more detailed presentation. After World War II, Maritime developed a design for a new cargo vessel unofficially known as the Mariner and designated as C4–S–1a under the Maritime Administration's classification system.[4] The standard contract Plans and Specifications for the Mariner were prepared for Maritime by Bethlehem shortly before the Korean War.[5] Initially, Maritime contracted for the construction of 35 Mariners, to be built between 1951 and 1954. However, not all of the vessels retained the C4–S–1a design designation, since 33 of the ships were sold to private industry, normally after a period of service with the Military Sea Transportation Service. Occasionally, these private owners modified the Mariners, usually with respect to cargo handling gear and passenger quarters, to suit their different trade requirements, and in so doing received different design designations for their vessels. For example, three of the Mariners were bought by plaintiff, and designated as C4–S–1f. However, all the vessels bought by private operators from the Government kept the same basic design as the original C4–S–1a models in such features as size, speed, power, and appearance up to the weather deck, and continued to be recognized as Mariners.

By 1957 the disposition of the original group of 35 Mariners was completed. In 1959, when plaintiff was contractually obligated under a new operating-differential subsidy agreement to replace two of its older cargo ships, plaintiff used Section 504 of the Merchant Marine Act to finance con-

[4] The components of this design designation have the following significance: "C" indicates a cargo vessel; "4" refers to a vessel between 500 and 550 feet in length; "S" means a steamship with accommodation for 12 or fewer passengers; "1" signifies that this was the first such design developed by Maritime; "a" indicates that this specific design is the first in a series depicting the same basic vessel.

[5] Maritime started the Mariner construction program to prevent the obsolescence of the entire American merchant fleet, which by 1951 consisted primarily of ships built before World War II. This program was begun to promote the construction of modern vessels to meet our national defense needs, to give domestic shipyards experience in building modern vessels so that they could accomplish a large-scale construction program in time of emergency, and to preserve America's shipbuilding industry and facilities.

struction of the new vessels. There is evidence to show that the specifications for the new vessels were directly based on the Mariner design which had been developed by Maritime. In an affidavit presented on plaintiff's behalf, E. Scott Dillon, a naval architectural consultant formerly employed by Maritime, concludes:

> Pacific Far East Line, Inc.'s two dry cargo ships built between 1959 and 1962 by Bethlehem Steel Company in accordance with design C4–S–1t, Maritime Administration Hull Numbers 89 and 90, were clearly within the Mariner class of vessels. In my opinion, design C4–S–1t is directly based upon the prototype Mariner design C4–S–1a. Pacfiic Far East Line's subject vessels are properly described as Mariner class vessels, having the original hull form, dimensions, speed, and power characteristics.

The total cost of the two vessels was $27,931,945, of which $14,558,924.66 was paid by plaintiff. For tax years 1962, 1963, and 1964, the period at issue in this litigation, plaintiff computed its tax credit based on its entire share of the cost of the two vessels. On audit, the Service concluded, in part, that plaintiff's entitlement to the credit was restricted under section 48(b)(1) to that portion (15.3 percent) of its total basis in the vessels attributable to post-1961 construction costs. Accordingly, deficiencies were assessed by the Service[6] and were paid by plaintiff. On April 30, 1970, the Service disallowed taxpayer's refund claims. Plaintiff then filed its petition in this court to recover taxes in the amount of $791,927.60, plus interest.

As we held in *Lykes Bros. Steamship Co.*, property is constructed "by the taxpayer" under section 48(b)(1) only if we find that the taxpayer possesses the right to control the

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[6] A number of the deficiencies asserted in the Service's deficiency report are unrelated to the investment tax credit issues involved in this litigation. The report also raised two additional issues regarding the taxpayer's claimed investment credit for the construction of the two ships. The Service asserted (1) that the taxpayer had improperly included in its basis amounts it had paid for the vessels out of statutory tax-deferred reserve funds and (2) that the Service could recapture the investment credit to reflect the taxpayer's use of the tax-deferred funds to pay off purchase money mortgages placed on the vessels. Both of these questions involving the taxpayer's use of tax-deferred funds are at issue in this refund suit, but they are not subject to the motions for partial summary judgment.

details of the construction process. In that case, we also held that the question whether the ships were constructed in accordance with taxpayer's specifications, within the meaning of Treasury Regulation 1.48–2(b)(1), is to be determined largely by the extent of the Government's supervision and control. In this case, plaintiff has shown, even more conclusively than was done by the taxpayer in *Lykes Bros. Steamship Co.*, that plaintiff did not have the right to exercise and did not in fact maintain the degree of control necessary to place the construction of the property within the provisions of section 48(b)(1).

The degree of Government control over the details of this construction contract was even more pervasive than it was in *Lykes Bros. Steamship Co.* Pursuant to the CDS program, Maritime was required to approve the final contract Plans and Specifications, to supervise the awarding of the construction contract, to approve any revisions by Bethlehem of the Plans and Specifications, and to test the vessels after construction for compliance with the contract. Only after the vessels had passed all of the post-construction tests could plaintiff actually take delivery of the ships. In this case, however, the Government played a larger role in designing the vessels than in *Lykes Bros. Steamship Co.* As shown by Mr. Dillon's affidavit on this issue, the design for the ships was developed some years before their construction by Bethlehem and Maritime; plaintiff merely requested Maritime to approve certain minor modifications of this model so that the completed vessel would more nearly meet its commercial needs.

It should be noted that defendant has not contested Mr. Dillon's affidavit by an opposing affidavit, deposition, or documentary evidence. Instead, it merely asserts in its brief that it "dispute[s] taxpayer's assertion that the ships were built to Government specifications." *Defendant's Reply Brief*, at 21. Defendant contends that the mere similarity between fundamental design and basic characteristics such as size, speed, power and general appearance does not demonstrate that the Government established the performance characteristics of the ships or the type of materials to be

used in construction. Defendant's assertion is merely that the vessel modifications *may* have been so extensive as to change the overall style of the ships in question. On this ground, defendant asks us to "remand to the Trial Judge for taking of proof" on the issue. This tactic by defendant is not adequate to preserve a dispute of fact for determination by trial. Rule 101(f) states:

> * * * When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, will be entered against him.

Our case law is to the same effect. As we held in *Hartwig* v. *United States*, 202 Ct. Cl. 801, 810–11, 485 F. 2d 615, 620 (1973):

> * * * Summary judgment proceedings of the type now before the court are designed to pierce the pleadings in an attempt to dispose of sham or paper issues. F. JAMES, CIVIL PROCEDURE § 6.18 (1965). This can only be accomplished where the parties are required to supply depositions or affidavits to support their allegations or denials. This is the view taken by our Rule 101(f). A party is not free to simply rest on the general allegations or denials in its pleadings when contesting a motion for summary judgment. * * *

See *Royal Indemnity Co.* v. *United States*, 178 Ct. Cl. 46, 51–52, 371 F. 2d 462, 465 (1967), *cert. denied*, 389 U.S. 833 (1967).

Defendant's explanation for its failure to supply an affidavit of its own on this issue is simply not persuasive. Although the affidavit of Mr. Dillon does not refer, except in a footnote, to the word "specifications," the overall thrust and meaning of his testimony is obvious. It is clearly his conclusion that the two vessels in question were identical to the Government-designed C4–S–1a models, except for modifications regarding the internal arrangement of cargo space, passenger compartments and cargo gear. Furthermore, de-

fendant cannot explain its failure to respond to plaintiff's affidavit by the fact that the parties had originally agreed to defer discovery procedures until after we reached a decision in *Lykes Bros. Steamship Co.* When the present case was scheduled for oral argument on its own, plaintiff claimed that its situation was stronger than *Lykes Bros. Steamship Co.* because its vessels were patterned directly on the Government's design. Defendant had an obligation to come forward and rebut Mr. Dillon's affidavit, the only direct piece of evidence on this point. Since defendant has failed to counter this affidavit, we must accept the truth of Mr. Dillon's statements in determining the degree of Government control over the details of the ship construction involved in this case.[7]

As in *Lykes Bros. Steamship Co.*, the actual day-to-day construction of the vessels was accomplished by Bethlehem, an independent contractor, and not by the taxpayer. Bethlehem had exclusive dominion over the work site, which on this occasion was its San Francisco shipyard. It had substantial design responsibilities with respect to the ships and was required to develop numerous detailed working plans to aid in the actual construction. The contract explicitly provided, in Article 20 of the General Provisions, that "the workmen and employees upon the contract work shall at all times be employees of the Contractor or its subcontractors and shall not be employees of the Owner or [the Government]." Bethlehem was also responsible for selecting all subcontractors, vendors, and suppliers for the construction project. The entire risk of loss for destruction of or casualty to the vessels fell upon Bethlehem during construction and prior to delivery. Finally, Bethlehem was responsible for

[7] We should note, however, that in all likelihood defendant's mistake with regard to the affidavit is not one which changed this decision to its disfavor. Without an answering affidavit we have a situation similar to *Lykes Bros. Steamship Co.*, where we found that the control factors demonstrated that the ships were not constructed "by the taxpayer." Furthermore, at oral argument counsel for defendant admitted that he had no specific knowledge of any evidence he could produce at trial to show that the modifications were so extensive that the ships as constructed were not similar to the original Mariner plans produced by the Government.

manning the vessels during tests and sea trials, and for securing all necessary certifications required by Federal, state, and local law. In summary, Bethlehem built and delivered to plaintiff two complete, seaworthy, and totally operational dry cargo vessels. Indeed, the contract assigned no role to the taxpayer apart from removal of the vessels from the shipyard after completion and formal delivery. *See* Special Provisions, Article I(b).

For these reasons, we find that plaintiff's role in the construction of the two vessels was primarily a passive one. On the one hand, the basic contract plans were the product of Government draftsmen, and on the other, the design details required to construct the ships were supplied by Bethlehem. Bethlehem's overall responsibility and control for the day-to-day construction activities, along with the overwhelming degree of control exercised by the Government pursuant to the CDS program, demonstrates clearly that these ships were not constructed "by the taxpayer" under section 48(b)(1), nor in accordance with its specifications as provided in Treasury Regulation § 1.48–2(b)(1).

The property in question here was clearly "acquired" by plaintiff after December 31, 1961, pursuant to section 48(b)(2). The Certificates of Delivery establish beyond a doubt that the ships were "reduced to [taxpayer's] physical possession, or control" in 1962. *See* Treas. Reg. 1.48–2(b)(6). There is no question that the ships' "original use" occurred in 1962, after plaintiff took control of the vessels on their respective dates of delivery. Since the vessels do not fall within the provisions of section 48(b)(1) and do qualify for treatment under section 48(b)(2), plaintiff should have been allowed to use its entire basis in the construction of the ships in determining the investment credit for the tax years in question.

For these reasons, plaintiff's motion for partial summary judgment is granted, defendant's cross motion for partial summary judgment is denied and the case is remanded to the trial judge for a determination of the remaining issues in the case.

Syllabus

512 F. 2d 1383

JOHN H. YEE v. THE UNITED STATES

[No. 449-73. Decided March 19, 1975]*

ON PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

Military pay; illegal discharge; Selection Board pass overs; record before Board; measure of recovery.—Plaintiff was discharged from the Air Force on March 31, 1965 with severance pay in the grade of Captain. His appeal of the discharge was denied by the Air Force Board for Correction of Military Records (AFBCMR), but it subsequently recommended his reinstatement to active duty. On July 6, 1970 the Assistant Secretary of the Service held plaintiff's discharge constituted an injustice, directed correction of his records in accordance with the Board recommendation, and ordered his reinstatement to the grade of Captain with back pay and allowances. Four months after reinstatement the Selection Board passed over plaintiff for promotion; at that time only one Officer Effectiveness Report (OER) concerning his performance as Captain was in his selection folder and no adequate explanation of the 5-year gap in his career. On plaintiff's appeal for relief, the AFBCMR voided the pass over and the Service Assistant Secretary on August 23, 1971 directed removal of the pass over from plaintiff's file, but no adequate explanation was made of the 5-year gap. Having accumulated only three OER's after reinstatement, plaintiff was again evaluated and passed over by the Selection Board on November 8, 1971 and August 21, 1972. Plaintiff again appealed for relief and on August 10, 1973, three months after plaintiff was discharged by operation of law (10 U.S.C. § 8303(d) and 8846 (1970)), the AFBCMR recommended denial of the appeal, finding irrelevant the failure of the Selection Boards to be inadequately briefed or advised of the reasons for the voiding of plaintiff's December 7, 1970 pass over, giving little consideration to the 5-year gap, and omitting to give weight to the fact that plaintiff's problems stemmed from an original injustice committed by the Service itself. Plaintiff seeks here to recover back pay and allowances and other relief for his allegedly improper discharge and to recover the amount of civilian earnings offset when he was reinstated for the period from April 1, 1965 to July 5, 1970. It is *held* (1) that in view of the inadequate explanation of the 5-year gap in plaintiff's selection record, he could not have been given proper consideration by either Selection Board; (2) that the AFBCMR was arbitrary and capricious in not taking sufficient steps to grant plaintiff thorough and fitting relief, i.e. effective action with respect

*Defendant's motion for rehearing filed April 17, 1975 is denied except to the extent that the opinion of the court has been amended as reflected in the report herein.

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to the 5-year void in OER's caused by his illegal discharge in 1965; (3) that plaintiff, having been passed over twice by invalid Selection Board decisions was illegally discharged; (4) that plaintiff is not entitled to recover attorney's fees, costs, interest and expenses; and (5) that plaintiff is not entitled to recover on his interim earnings offset claim, the offset being proper and consistent with other precedents, distinguishing *Bates* v. *United States*, 197 Ct. Cl. 35, 453 F. 2d 1382 (1972). Plaintiff is awarded back pay and allowances at the grade of Captain, the amount of recovery is to be determined pursuant to Rule 131(c), his request for promotion to Major is denied, and the Secretary of the Air Force is directed to correct plaintiff's records to reflect reinstatement effective April 30, 1973, and to correct his records consistent with this opinion. The petition is dismissed respecting the offset issue.

Military pay; active duty pay; discharge, wrongful or invalid; recovery, measure of; attorney's fees, costs, interest and expenses.

[1] Recovery of attorney's fees, costs, interest and expenses connected with correction of errors and injustices relative to wrongful discharge from the service is prohibited by statute and regulations.

Armed Services ⇐ 13.6(1)

Military pay; correction of military records; arbitrary and capricious action; what constitutes.

[2] Where, several years after his discharge from the Air Force, plaintiff was reinstated and reappointed to the grade of Captain following a determination that his discharge constituted an injustice, where 4 months after reinstatement his name was put before and passed over by a Selection Board for promotion to Major, but at that time there was only one Officer Effectiveness Report in his selection folder concerning his performance as Captain and no adequate explanation of the 5-year gap in service, where upon appeal said pass over was voided but without an adequate explanation of the 5-year gap being placed in his selection folder, and where subsequently having only three Officer Effectiveness Reports in his record which bore a rating of "exceptionally fine" he was twice passed over and was thus required by law to be honorably discharged, absent complete correction of the injustice by placing in his record an adequate explanation of the 5-year gap (admittedly caused by Air Force error) or by withholding plaintiff's name from submission to Selection Boards until sufficient time had elapsed for plaintiff to accumulate Officer Effectiveness Reports, the action of the Board in denying plaintiff relief was in violation of 10 U.S.C. § 1552, and such violation, contrary to the evidence was arbitrary and capricious.

Armed Services ⇐ 12

Military pay; courts and boards; Selection Board; record before Board.

[3] The procedures of the military Selection Boards must follow

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the law. In considering an officer's record for purposes of recommendation for promotion, the Board must have before it documents which are substantially complete and fairly portray the officer's record. Where the selection folder contains prejudicial information and omits documents equally pertinent which might have mitigated the adverse impact of the prejudicial information, the record does not comply with 10 U.S.C. § 5706.

Armed Services ⇐ 7

Military pay; correction of military records; duty of Correction Boards.

[4] The military correction boards have an abiding moral sanction to determine, insofar as possible, the true nature of an alleged injustice and to take steps to grant thorough and fitting relief.

Armed Services ⇐ 2

Military pay; discharge; validity of discharge.

[5] Where, on the basis of a selection folder which was incomplete and did not fairly portray plaintiff's record, the Selection Board twice passed over plaintiff for promotion, the decisions of the Board were invalid, and the discharge by reason of the two pass overs was accordingly illegal.

Armed Services ⇐ 7, 11

Military pay; active duty pay; discharge, wrongful or invalid; recovery, measure of.

[6] Generally, where an officer's discharge from the service has been found on judicial review to have been illegal, his recovery is limited to relief at the grade at which he was discharged.

Armed Services ⇐ 13.6(1)

Military pay; reinstatement; generally.

[7] Pub. L. 92–415 allows this court to fashion a complete remedy as an incident of and collateral to a money judgment within its general jurisdiction to enter money judgments under the Tucker Act.

Armed Services ⇐ 13.6(1)

Military pay; promotions; courts, jurisdiction.

[8] Courts generally are not in the "promotion business."

Armed Services ⇐ 7

Military pay; active duty pay; discharge, wrongful or invalid; recovery, measure of; interim earnings, deductibility of.

[9] In a successful claim for active duty pay and allowances by reason of an illegal discharge from the military service, the amount of back pay which plaintiff may recover is subject to the Government's right to set off in mitigation the amount of plaintiff's civilian earnings during the period of wrongful discharge. *Bates* v. *United States*, 197 Ct. Cl. 35, 453 F. 2d 1382 (1972), distinguished.

Armed Services ⇐ 13.7

Norman Lew, attorney of record, *Paul S. Fong*, of counsel, for plaintiff.

Kenneth J. Ingram, with whom was *Assistant Attorney General Carla A. Hills*, for defendant.

Before DAVIS, KASHIWA, and KUNZIG, *Judges*.

KUNZIG, *Judge*, delivered the opinion of the court:

The primary question before us in this military pay case is whether the failure of the Air Force Board for the Correction of Military Records (AFBCMR) to remove promotion pass overs from plaintiff's record was arbitrary and capricious.[1] A secondary question concerns the Air Force Accounting and Finance Center and whether it improperly offset civilian earnings in computing plaintiff's back pay and allowances after his erroneous discharge in 1965.

As to the primary issue, we hold the action of the AFBCMR to have been arbitrary and capricious. Secondly, we hold the Air Force Accounting and Finance Center to have been correct in offsetting civilian earnings from plaintiff's award of back pay.

Facts

Plaintiff enlisted in the Air Force on October 9, 1954, and was appointed a Second Lieutenant on April 20, 1960. On April 20, 1964, plaintiff's automobile was involved in a head-on collision in which he suffered physical injury. Due to this injury, he was discharged from the Air Force on March 31, 1965 with severance pay in the grade of Captain.[2] Plaintiff appealed his discharge to the AFBCMR which initially denied his appeal, but subsequently recommended that he be reinstated to active duty. On July 6, 1970, over 5 years after his discharge, the Assistant Secretary of the Air Force held plaintiff's discharge constituted an *injustice*,

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[1] A removal of promotion pass overs and appropriate correction of plaintiff's record could reflect an adequate explanation of the unjust 5-year gap in plaintiff's Officer Effectiveness Reports. Alternatively, such a removal could change said record and correct the Air Force's failure to delay plaintiff's consideration by a Selection Board until an appropriate number of OERs could be accumulated.

[2] He was first appointed to the grade of Captain on October 20, 1964.

directed that his records be corrected in accordance with the AFBCMR recommendation, and ordered plaintiff's reinstatement to the grade of Captain with appropriate back pay and allowances.

Prior to plaintiff's reinstatement, the Assistant Secretary of Defense directed the Assistant Secretaries of the military departments [3] to require deduction of interim civilian earnings from amounts found due members or former members of the uniformed services by reason of the correction of their military records.[4] Thus, when the Air Force Accounting and Finance Center computed the amount due plaintiff on September 2, 1970, plaintiff's civilian earnings of $26,336.67 were offset from the $44,262.55 he would have received had he not been erroneously and unjustly discharged. Plaintiff did receive a net of $17,925.88.

On December 7, 1970, just four months after his reinstatement, plaintiff was considered by a Selection Board for promotion to the grade of Major, but was not selected. At that time, there was only one Officer Effectiveness Report (OER) concerning plaintiff's performance at the grade of Captain in his selection folder, and no adequate explanation of the 1965–1970 gap in his career. Fearful that his pass over would prevent him from being promoted in the future, plaintiff again appealed for relief to the AFBCMR. Again the AFBCMR found in plaintiff's favor. In voiding the December 7 pass over, the AFBCMR stated:

> There can be no argument with the selection board's decision that Captain Yee's record, as reflected in his selection folder, did not merit his selection under the best qualified method of selection. Nevertheless, we concur with him that his consideration was unjust because of the long period (more than 5 years) in which, through

[3] On March 12, 1969.

[4] On October 21, 1970, the Air Force changed AFR 31–3, which had been in effect since January 2, 1962. This regulation established procedures for making application, and consideration of applications, for the correction of military records by the Secretary of the Air Force acting through the Air Force Board for the Correction of Military Records. The new provision, AFR 31–3, specifically stated in paragraph 26a that "earnings received from civilian employment during any period from which active duty pay and allowances are payable may be deducted from the settlement." This change reflected the policy established by the Assistant Secretary of Defense in his memorandum issued on March 12, 1969, and is similar to policy followed in civilian pay cases.

> no fault of his, he received no OERs. Accordingly, we recommend that his record be corrected to show that he was not considered for promotion in FY 1971 [December 7, 1970]. [quoting the advisory opinion of the Officer Promotion Branch, USAFMPC, dated 28 July 1971]

On August 23, 1971, the Assistant Secretary of the Air Force issued a directive to remove the pass over from plaintiff's file. The pass over was thus voided, but without an adequate explanation of the 5-year gap in plaintiff's selection folder, even though the AFBCMR knew his name would again be placed before a Selection Board in November, 1971.

Plaintiff subsequently was evaluated by the Selection Board on November 8, 1971. This Selection Board had access to only three OERs on plaintiff relating to his performance in the grade of Captain. (August 1, 1970 until October 8, 1971.) In each of these OERs, plaintiff received an overall rating of "Exceptionally Fine." Again plaintiff was not selected for promotion; and again, on June 12, 1972, plaintiff appealed to the AFBCMR. On August 21, 1972, plaintiff once more was considered by a Selection Board for promotion to the grade of Major; but once again, he was passed over. On May 7, 1973, plaintiff amended his June 12, 1972 appeal to the AFBCMR to include this new pass over.

Having now been officially passed over twice by Selection Boards, plaintiff was required by law to be honorably discharged as an officer from the Air Force.[5] This discharge occurred on April 30, 1973. Plaintiff then immediately enlisted in the Regular Air Force on May 1, 1973 in the grade of Sergeant, in which position he still serves.

Plaintiff's appeal for relief to the AFBCMR asserted in essence that he was not afforded a complete remedy in 1971 when his December 7, 1970 pass over was voided. He maintained that this lack of remedial action directly contributed to his subsequent pass overs in 1971 and 1972 and consequent discharge on April 30, 1973. On August 10, 1973, three months after plaintiff had been discharged as an officer and after a formal hearing had been conducted, the AFBCMR recommended that plaintiff's application for relief be denied. In reaching its conclusion, the AFBCMR found the failure

[5] 10 U.S.C. §§ 8303(d) and 8846 (1970).

of the Selection Boards to be adequately briefed or advised of the reasons for the voiding of plaintiff's December 7, 1970 pass over irrelevant. In addition, the AFBCMR gave little consideration to the gap in OERs in plaintiff's selection folder for the period 1965–1970.

More importantly, it is difficult to find in the opinion of the AFBCMR how much weight, if indeed any weight, was placed on the fact virtually all plaintiff's military problems stemmed from an original injustice *committed by the Air Force itself.*

Rather, the AFBCMR found that plaintiff's record of performance "speaks for itself" and does not "place him in a category that one would describe as quote 'selective material' unquote." On August 21, 1973, the Assistant Secretary of the Air Force adopted this recommendation and directed that plaintiff's application for relief be denied.

On November 20, 1973, plaintiff, claiming jurisdiction under 28 U.S.C. § 1491, brought suit in this court to recover and receive (1) back pay and allowances and other relief for his allegedly improper discharge in 1973 and (2) $26,336.67 for the alleged wrongful offset from his back pay and allowances award in 1970. For the reasons stated below, we hold for plaintiff on the discharge issue (while denying his request for promotion), and for defendant with regard to the offset of civilian pay.[6]

I. *The 1973 Discharge Issue*

Plaintiff argues that the action of the AFBCMR in denying his request for relief was arbitrary and capricious. He therefore seeks back pay and allowances equal to the grade of Major or, in the alternative, the grade of Captain from the date of his allegedly invalid discharge. As collateral relief, he also seeks reinstatement as a commissioned officer with correction of his military records to reflect the same.

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[6] In paragraph 3 of his prayer for relief, plaintiff also sought to recover attorney's fees, costs, interest, and expenses connected with the correction of errors and injustices relative to his wrongful discharge on March 31, 1965 and to subsequent errors and injustices. However, it is well settled by case law, statute and regulation that such costs are not recoverable. *See* 28 U.S.C. §§ 2412 and 2516(a). Air Force Regulation 31–3, and *Middleton* v. *United States*, 175 Ct. Cl. 786, 795–96 (1966).

Although this is a close case, on the facts presented in these cross-motions for summary judgment we agree that the AFBCMR's denial was arbitrary and capricious. By defendant's own admissions, plaintiff had been, on two separate occasions, the victim of injustices caused by the Air Force: first, when plaintiff was erroneously discharged in 1965; and second, when plaintiff's name was put before a Selection Board a mere four months after returning to active duty. What is not admitted, but is clear from the record, is that plaintiff continued to suffer from these two injustices because inadequate corrective action was taken to prevent recurring problems arising from the original error of the Air Force.

The primary factor which persuades us in plaintiff's favor is the failure of the Air Force at any time completely to correct the injustice caused by plaintiff's illegal discharge in 1965. The Air Force failed either to place an adequate explanation in plaintiff's record of the 5-year gap in OERs (which was admittedly caused by Air Force error) or to withhold plaintiff's name from submission to Selection Boards until sufficient time had elapsed for plaintiff to accumulate OERs. This failure prolonged the effect of the injustice until it ultimately led to plaintiff's 1973 discharge.

In essence, plaintiff's problems, since his 1970 reinstatement, stem mainly from his erroneous discharge in 1965. The AFBCMR, itself, when granting plaintiff's request in 1971 to void his December 7, 1970 pass over, envisioned the need for one or both of the above corrective measures when it stated, "[plaintiff's] consideration [for promotion] was unjust because of the long period (more than 5 years) in which, through no fault of his, he received no OERs."

We believe it would have been virtually impossible for any Selection Board to give proper consideration to plaintiff unless it had access to an adequate explanation of the 5-year gap caused by the Air Force or, in the alternative, sufficient time had elapsed for OERs to accumulate on which it could have made an informed judgment. Yet the AFBCMR, while recognizing the overall problem, merely voided plaintiff's December 7, 1970 pass over. The failure of the AFBCMR to take either additional step rendered its deci-

sion only a partial correction. And in this case, a partial correction was no correction at all.

Defendant argues that any injustice suffered by plaintiff was corrected when his December 7, 1970 pass over was voided. Defendant points out that plaintiff was granted the specific relief he requested, i.e., the removal of the pass over from his selection folder. While this characterization of plaintiff's request may be technically correct, we believe defendant, just as the AFBCMR, misses the true intent of plaintiff's appeal. While plaintiff may have only requested the December 7, 1970 pass over be removed from his selection folder, his implicit request was to have this obstacle removed so that he might be fairly considered for future promotion. And this obstacle could only be removed effectively if corrective action were taken with respect to the 5-year void in OERs caused by his illegal discharge in 1965. Thus, the removal of his December 7, 1970 pass over merely stayed, but did not correct, the injustice which, at least in part, caused the pass over. This removal was in itself an additional injustice for it not only failed to eliminate the cause of plaintiff's complaint, but virtually insured continuation of the same problem.

Had the Air Force either put in plaintiff's files an adequate explanation that his 5-year gap in OERs had been caused by an injustice committed by the Air Force itself, or delayed plaintiff's evaluation by Selection Boards until an appropriate number of OERs could have been accumulated, there can be little doubt this court might well have reached a far different conclusion in the instant case. But without either, we cannot agree with the AFBCMR when it said that plaintiff was given fair and just consideration for promotion by the November 8, 1971 and August 21, 1972 Selection Boards or that the absence of an adequate explanation in his files was irrelevant. For the foregoing reasons, we believe plaintiff could not have been given proper consideration by either Selection Board. As we stated in *Weiss* v. *United States*, 187 Ct. Cl. 1, 7, 408 F.2d 416, 419 (1969):

> [T]he selections procedure must follow the law. The documents which are sent to a Selections Board for its consideration therefore must be substantially complete,

> and *must fairly portray the officer's record.* If a Service Secretary place [*sic*] before the Board an alleged officer's record filled with prejudicial information and *omits documents equally pertinent which might have mitigated the adverse impact of the prejudicial information*, then the record is not complete, and it is before the Selection Board in a way other than as the statute [10 U.S.C. § 5706] prescribes.[7] [emphasis supplied]

Here it is evident that plaintiff's record, through no fault of his own, was not complete.

The AFBCMR has the power, and the duty, to remove injustices and correct errors in servicemen's records. 10 U.S.C. § 1552 (1970) states:

> The Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may correct any military record of that department when he considers it necessary to correct an error or remove an injustice.

In this case, it is clear that the AFBCMR in 1971 only partially corrected and in 1973 totally failed to correct the injustice done to plaintiff. As this court has said before and reaffirms today, when a correction board fails to correct an injustice clearly presented in the record before it, it is acting in violation of its mandate. And such a violation, contrary to the evidence, is arbitrary and capricious. *See Skaradowski* v. *United States*, 200 Ct. Cl. 488, 471 F. 2d 627 (1973); *Duhon* v. *United States*, 198 Ct. Cl. 564, 461 F. 2d 1278 (1972).

In *Skaradowski*, *supra*, we emphatically stated:

> [T]he statutory charter of the boards for correction of military records (10 U.S.C. § 1552) provides for correction of "*any* military record" when considered necessary "to correct an error or *remove an injustice.*" * * * The court has absolutely no doubt that under this liberal standard, together with the admitted facts, the board was required to change plaintiff's records * * *. The board's contrary determination was arbitrary and ca-

[7] 10 U.S.C. § 5706 provides that a Selection Board be furnished "the records of all officers whose names are furnished to the board." As we stated in *Weiss* v. *United States*, 187 Ct. Cl. 1, 5, 408 F. 2d 416, 418 (1969), "[t]he Congressional purpose would dictate that the 'record' required to be furnished under that section be complete and not misleading."

> pricious under the controlling standard as well as unsupported by substantial evidence and legally erroneous. The record compelled the board to correct plaintiff's record in order to "remove an injustice" against him. [emphasis original] *Id.* at 489, 471 F. 2d at 628.

The same rationale applies in the present case.[8]

Military correction boards "have an abiding moral sanction to determine, insofar as possible, the true nature of an alleged injustice and to take steps to grant thorough and fitting relief." *Duhon*, *supra* at 570, 461 F. 2d at 1281, *quoting Caddington* v. *United States*, 147 Ct. Cl. 629, 634, 178 F. Supp. 604, 607 (1959). While it is clear that the AFBCMR saw the injustice of plaintiff's December 7, 1970 pass over, it is equally clear that, even with two separate reviews, it did not take sufficient steps to grant thorough and fitting relief. The AFBCMR knew in 1971 that plaintiff's name would again be submitted to a Selection Board on November 8, 1971, yet failed to insure that plaintiff's fate would not again be prejudiced by the same 5-year gap in his record. The Board further knew the consequences of its silence when, in 1973, it reviewed plaintiff's case after two subsequent pass overs and a forced discharge. Yet the AFBCMR still saw no reason to grant relief.

Thus, the abortive actions of two AFBCMRs did not succeed in removing an injustice, but rather in perpetuating one.

It follows that plaintiff, having been passed over twice by the invalid decisions of Selection Boards, was illegally discharged. Consequently, he is entitled to recover, but his recovery is limited to relief at the grade at which he was discharged. Public Law 92–415 [9] allows this court to fashion a complete remedy in cases where appropriate. In pertinent part, it states:

> To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders di-

[8] For a detailed discussion of the jurisdiction of this court in cases arising from military correction boards, *see* Glosser and Rosenberg, *Military Correction Boards: Administative Process and Review by the United States Court of Claims*, 23 AM. U. L. REV. 391 (1973).

[9] Pub. L. No. 92–415, § 1, 86 Stat. 652 [codified at 28 U.S.C. § 1491 (Supp. II 1972)].

> recting restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just.

If we were merely to award back pay and allowances at the grade of Captain from the date of illegal discharge, plaintiff would not be made whole. But we are empowered to do more and choose to exercise this power. We therefore order the Secretary of the Air Force to remove from plaintiff's selection folder and from any other pertinent military records (1) plaintiff's November 8, 1971 pass over; (2) plaintiff's August 21, 1972 pass over; (3) plaintiff's April 30, 1973 discharge as an officer; and (4) plaintiff's May 1, 1973 enlistment. We direct the Secretary to reinstate plaintiff to the grade of Captain, effective April 30, 1973. And we further direct the Secretary to place in plaintiff's selection folder an adequate explanation of the 5-year gap from 1965–1970 and the 1973–1975 gap, making it clear that these gaps were not caused by any fault on the part of plaintiff. We urge the Secretary to consider the scheduling of possible future evaluations of plaintiff by Selection Boards consistent with the spirit reflected above.

A court-ordered promotion to the grade of Major has also been requested by plaintiff. This we reject. Courts generally are not in the "promotion business." *Orloff* v. *Willoughby*, 345 U.S. 83 (1953); *Brenner* v. *United States*, 202 Ct. Cl. 678 (1973), *cert. denied*, 419 U.S. 831 (1974); *Muldonian* v. *United States*, 193 Ct. Cl. 99, 432 F. 2d 443 (1970); *Clinton* v. *United States*, 191 Ct. Cl. 604, 423 F. 2d 1367 (1970). In the present case, we cannot say that, even if the Selection Boards had been given a complete record, plaintiff would necessarily or even probably have been promoted. We can only say that plaintiff should not have been discharged.

To summarize, we hold the action of the AFBCMR in denying plaintiff's request for relief to have been arbitrary and capricious. We therefore award plaintiff back pay and allowances at the grade of Captain (while denying his re-

quest for promotion) and direct the Secretary of the Air Force to correct his records to reflect reinstatement consistent with the order of this court.

II. *The Offset Issue*

In addition to relief from his forced discharge in 1973, plaintiff also seeks recovery of $26,336.67, the amount of civilian earnings offset when he was reinstated for the period from April 1, 1965 to July 5, 1970. Plaintiff alleges this deduction was erroneous since Air Force Regulation 31–3, effective October 1970, which authorizes the offsetting of civilian earnings was not in force and effect at the time the active duty pay accrued, nor was it in force and effect when the Air Force Accounting and Finance Center computed plaintiff's back pay and allowances. In support of this claim, plaintiff relies on our holding in *Bates* v. *United States*, 197 Ct. Cl. 35, 453 F. 2d 1382 (1972).

In *Bates*, plaintiff sued to recover his civilian pay for the period June 17, 1968 to April 14, 1969. Bates' record was corrected on September 25, 1970, prior to revision of Air Force Regulation 31–3 permitting the offset of civilian earnings from back pay found due. This court disallowed the civilian pay offset in *Bates*. However, in reaching its decision, the *Bates* court was informed neither by plaintiff nor defendant of *the March 12, 1969 directive issued by the Assistant Secretary of Defense*[10] *and the practice within the Air Force prior to 1970 consistent with this directive.* Defendant belatedly attempted to bring this directive to the court's attention in its February 22, 1972 motion for rehearing. However, the motion was denied without explanation on May 12, 1972. Had the *Bates* court been timely informed of the directive and Air Force practice, the result might well have been different. In any event, in the instant case, this court is fully cognizant of both the directive and Air Force practice prior to plaintiff's 1970 reinstatement and finds the offset on September 2, 1970 of plaintiff's civilian

[10] This directive stated, in pertinent part, that "appropriate action should be taken to *require deduction* of interim civilian earnings" in correction board cases such as the case at bar. [emphasis supplied] For additional discussion, see text accompanying note 4 *supra*.

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earnings for the period from April 1, 1965 to July 5, 1970 to be entirely proper and consistent with other precedents requiring the offset of civilian wages. *See Middleton* v. *United States*, 175 Ct. Cl. 786 (1966); *Motto* v. *United States*, 175 Ct. Cl. 862, 360 F. 2d 643 (1966); *Clackum* v. *United States*, 161 Ct. Cl. 34 (1963).

We, therefore, hold that plaintiff's claim in re the offset issue has no merit.

* * * * *

As to the 1973 discharge issue, plaintiff's motion for summary judgment is granted in part and denied in part, and defendant's cross-motion is granted in part and denied in part. Accordingly, plaintiff is entitled to recover, in part, on his claim, and judgment is entered to that effect with the amount of recovery to be determined pursuant to our Rule 131(c). The Secretary of the Air Force is ordered to reinstate plaintiff to the grade of Captain, effective April 30, 1973, and to correct plaintiff's applicable records consistent with this opinion, pursuant to Rule 147(c) of the Rules of this court.

As to the offset issue, defendant's motion for summary judgment is granted and plaintiff's cross-motion is denied, with the petition, as to this issue, dismissed.

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512 F. 2d 1398

UNITED STATES v. THE GOSHUTE TRIBE OR IDENTIFIABLE GROUP, REPRESENTED BY THE CONFEDERATED TRIBE OF THE GOSHUTE RESERVATION

Appeal No. 6-74

Ind. Cl. Comm. Docket No. 326-J

31 Ind. Cl. Comm. 225 (1973)
32 Ind. Cl. Comm. 230 (1973)

[Decided March 19, 1975]

ON APPEAL FROM THE INDIAN CLAIMS COMMISSION

Indian claims; Indian Claims Commission; taking date; compensation for pretaking date removal of minerals; license v. permanent

Syllabus

easement; Tuilla Valley Treaty of 1863.—The United States has appealed from a decision of the Indian Claims Commission awarding the Goshute Tribe compensation for the loss of its aboriginal Indian title lands. The award included the fair market value of the lands as of January 1, 1875 (the date of taking or extinguishment of Indian title as found by the Commission on the basis of the evidence), and a 20% royalty for the value of minerals removed from the lands prior to that date pursuant to the Tuilla Valley Treaty between the United States and the Goshute Tribe, dated October 12, 1863, which permitted such removal and the entry of miners and prospectors on the Goshute lands. The Treaty provided for payment of $1,000 a year (in kind, not money) for unlimited access to the minerals, then already discovered, plus highways, military posts and a railroad, which the Commission found constituted dishonorable dealings under 25 U.S.C. § 70a(5). This is not a case of "trespass" damages. The United States supports the taking award, but denies liability for the removal of minerals prior to January 1, 1875; urges an "estoppel" against the Indians as regards its pre-taking royalty award for minerals because of a statement by the Indians' counsel made when the Commission was considering the appropriate taking date and before completion of appraisals of the lands and of the minerals removed; and contends that the original petition did not plead a cause of action for minerals removal prior to January 1, 1875. It is *held* (1) that the original petition was adequate to inform the United States that dishonorable dealings might be asserted against it and that it might be held liable for depredations of miners acting under its authority or pursuant to the Treaty; (2) that "estoppel" is inapplicable since the record does not show that the statement was accepted as a stipulation of fact; (3) that the United States had ample notice how much the Indians were intending to claim for pre-taking removal of minerals; (4) that as to the minerals, by the Treaty the Indians granted no more than a license; (5) that the found date of January 1, 1875 is based on substantial evidence and must stand on appellate review; and (6) that absent any indication that the Indians would be paid twice for the same takings, the Commission's evaluation as of the taking date and the compensation awarded for removal of minerals before that date are affirmed; *United States* v. *Northern Paiute Nation*, 203 Ct. Cl. 468, 490 F. 2d 954 (1974), distinguished.

Indian claims; Indian Claims Commission; fair and honorable dealings.

[1] Where the 1863 Treaty of Tuilla Valley promised to pay the Indians $1,000 per year, in kind not money, for unlimited access to the minerals on their lands, then already discovered, plus use of highways, establishment of military posts and construction and operation of a railroad, such provisions violated the Government's

Syllabus

obligation under 25 U.S.C. § 70a(5) to deal fairly and honorably with the Indians.

Indians ⇐ 11

Indian claims; Indian Claims Commission; discretion of Commission.

[2] Where two or more clauses of 25 U.S.C. § 70a, such as the "fair and honorable dealings" and the "unconscionable consideration" clauses, cover the same factual situation, the Indian Claims Commission enjoys discretion under which to proceed, and if it selects the method less onerous as to proof, that does not establish that it has abused its discretion.

United States ⇐ 113

Indian claims; Indian Claims Commission; fair and honorable dealings.

[3] In order for Indians to establish a claim against the United States for breach of fair and honorable dealings within the meaning of 25 U.S.C. § 70a(5), there must be a showing that a "special relationship" existed. A "special relationship" arises when United States officials tender a treaty to Indians for adhesion.

United States ⇐ 105

Estoppel; grounds of estoppel; claim or position in judicial proceedings.

[4] At a time when the Indian Claims Commission was considering what taking date to use and before completion of appraisals of the subject lands and the amount and value of the minerals removed, a statement by appellee-Indians' counsel that if the later of two alternative taking dates were used the Indians would claim the minerals removed before that date as a separate item, but that the earlier taking date would allow award for the minerals as still in the ground, cannot be considered as creating an estoppel to the assertion of the Indians' right to claim damages for minerals removed prior to the earlier taking date absent an accompanying colloquy to show that the statement was accepted as a stipulation of fact. An interpretation importing the relinquishment of part of the Indians' claim should be avoided, if possible, particularly where the circumstances indicate that the statement was simply counsel's unsound and fallacious argument.

Estoppel ⇐ 68(1)

Indian claims; treaties with Indians; construction and operation of treaties; Tuilla Valley Treaty; minerals.

[5] In general, ambiguities in Indian treaties drafted by Government officials should be construed in favor of the unlettered Indians. Thus, since the Indian Claims Commission determined that the Treaty of Tuilla Valley was not a treaty of cession whereby the Indians' aboriginal title was extinguished, consistent with the *contra proferentem* rule Article 4 of the treaty is construed to mean that the Indians voluntarily granted no more than a license to remove minerals and not a permanent easement; otherwise the mineral value

should have been excluded from the taking award and the 20% royalty for breach of fair and honorable dealings in the Treaty should have applied to all the minerals, whenever removed, until exhaustion.

Indians ⇐ 11

Indian claims; taking of Indian property; date of taking; generally.

[6] Where appellant has not demonstrated that the taking date found by the Indian Claims Commission is in error, the date must stand on appellate review, although an earlier date may also have been sustainable if found by the Commission.

United States ⇐ 113

Indian claims; Indian Claims Commission; awards; pre-taking date compensation.

[7] Where, based on substantial evidence, the Indian Claims Commission fixed a specific date of taking, where the pre-taking date removal of minerals was relatively large and had its full effect in assessing the taking date value, where the royalty for pre-taking minerals removed and the fair market value for the remaining removals were found on the basis of actual or estimated quantities and the cost of removal and marketing, and not on miners' speculations as in *United States* v. *Northern Paiute Nation*, 203 Ct. Cl. 468, 490 F. 2d 954 (1974), on the assumption that in negotiating the Treaty of Tuilla Valley the United States made itself responsible for fair and honorable dealings, it is fair and just that the Indians be compensated for the pre-taking removals in order to make them whole and to reimburse them for all that they lost.

United States ⇐ 105

Dean K. Dunsmore, with whom was *Assistant Attorney General Wallace H. Johnson*, for appellant.

Robert W. Barker, attorney of record for appellee. *Wilkinson, Cragun & Barker*, and *Donald C. Gormley*, *John S. White*, *Foster DeReitzes* and *John S. Boyden*, of counsel.

Before COWEN, *Chief Judge*, DURFEE, *Senior Judge* and NICHOLS, *Judge*.

NICHOLS, *Judge*, delivered the opinion of the court:

The United States has appealed from a decision of the Indian Claims Commission, 31 Ind. Cl. Comm. 225 (1973), awarding The Goshute Tribe Or Identifiable Group, Represented By The Confederated Tribe Of The Goshute Reservation (hereinafter The Goshutes), the total sum of

$7,253,122, less credits for payments and for offsets, still to be determined, with respect to a tract of 5,952,000 acres in Utah and Nevada. The Commission determined that the taking or extinguishment date of that tract was January 1, 1875, and valued the premises at $5,980,122 as of then. It also awarded $1,273,000 as compensation for removal of minerals before the taking date. We affirm.

The appellant would support the $5,980,122 award if that were all, but challenges it if the predicated taking date of January 1, 1875, leaves open a further liability for prior removal of minerals. It denies that it is subject to the latter liability, as determined, but would fix taking date earlier than the one used, if necessary for entire compensation. It also claims the benefit of an estoppel, perhaps just as accurately a stipulation, that the mineral removal damages would not be claimed if the Commission selected January 1, 1875, as the taking date. We have given its contentions careful consideration but cannot sustain them.

The Goshutes were in aboriginal times part of the Shoshones, but the Commission has found that, as a distinct tribe or identifiable group, they used and occupied the involved area exclusively. They lacked a political organization larger than the village until continued white contact resulted in a loose tribal organization with a Chief. 11 Ind. Cl. Comm. 387, 407–08, 416 (1962). They now occupy reservations at Deep Creek and Skull Valley, 128,196.35 acres, part of their aboriginal heritage, and have so occupied them since approximately the selected taking date. 31 Ind. Cl. Comm. 225, 227 (1973).

The first non-Indian settlements in the area were established by Mormons in 1849, but there was no real development until the discovery of silver and other minerals there in 1863.

I

By the Treaty of Tuilla Valley, October 12, 1863, 13 Stat. 681, The Goshutes and the United States agreed to establish peace and friendship. The Goshutes agreed to cease all depredations and that military posts, highways and a railway might be built through their territory.

Article 4 of the treaty reads as follows:

> * * * It is further agreed by the parties hereto that the country of the Goship tribe may be explored and prospected for gold and silver, or other minerals and metals; and when mines are discovered they may be worked, and mining and agricultural settlements formed and ranchos established wherever they may be required. Mills may be erected and timber taken for their use, as also for building and other purposes, in any part of said country.

By Article 6, The Goshutes agreed to abandon their roaming life, live in reservations, and become farmers or herdsmen whenever the President should deem it expedient for them to do so.

By Article 7, the United States agreed to pay The Goshutes $1,000 per annum, in kind, for twenty years, to compensate them for the "inconvenience" of having their game driven away or destroyed, and by the formation of agricultural and mining settlements in their territory.

There is no finding of The Goshutes being driven off their land by force. Numbering 400 to 700, they occupied it but sparsely. Conditions became difficult for them for the reasons specified in the treaty. They became dependent on Government largesse. By the found taking date, January 1, 1875, they were substantially all in the reservations established for them.

Regular shipments out of silver ore began in 1869, when rail transportation became available. The Commission has found that the gross value of the minerals removed from the area before January 1, 1875, mostly silver, was $6,365,000 (at 304). The award for this represents a 20% royalty, the figure the Commission believes an owner could have demanded successfully. It has found that a prudent purchaser would on January 1, 1875, have paid $2,730,122 (at 301–02), for full ownership of the minerals not yet removed on that date. The remainder of the taking award, $3,250,000 (at 291), was for the surface values.

II

The Commission says, and its figures substantiate, that the taking award reflects only the value of the minerals remain-

ing on January 1, 1875, and excludes the value of minerals already removed on that date. The theory of Government liability for the pre-taking period is that the 1863 Treaty promising a derisory $1,000 a year (in kind, not money), for unlimited access to the minerals, then already discovered, plus highways, military posts, and the railroad, to ignorant Indians, represented dishonorable dealings under Clause 5, Section 2 of the Act, 25 U.S.C. § 70a(5). We think this is too self-evident to require demonstration. Appellant says, if the Commission thought the $1,000 was inadequate it should have proceeded under Clause 3 (unconscionable consideration), and would have had to take testimony as to the value of the interest conveyed by the Treaty to compare it with the consideration paid. This would require the Commission to do things the hard way since, apparently, it would have had to value the railroad right-of-way, the highway rights-of-way, the military posts, etc., all part of the interest conveyed. It presupposes that the various clauses of the Act are mutually exclusive and the Commission must select the right Clause at its peril. There may, we think, be cases, as here, where two or more clauses cover the same factual situation, and the Commission then enjoys discretion under which to proceed. If it selects the method less onerous as to proof, that does not establish that it has abused its discretion, however reluctant some may be to have these interminable litigations ever end. Our decisions specify that a "special relationship" is necessary for a "fair and honorable dealings" claim to accrue. *E.g.*, *Aleut Community of St. Paul Island* v. *United States*, 202 Ct. Cl. 182, 480 F. 2d 831 (1973). Such a "special relationship" arises when United States officials tender a Treaty to Indians for adhesion.

The instant Goshute claims were separated off from a 47 page petition originally filed on behalf of a variety of Shoshone tribal claimants. The counts relating to The Goshutes, paragraphs 34 and ff., show that The Goshutes originally claimed that title to their tract was recognized by the Tuilla Valley Treaty, *supra*. Possibly this position was abandoned at some point in view of Article 8, which says the Treaty is not to be construed as admitting the Indians had any other or greater title than existed in them upon acquisition of the ter-

ritories from Mexico. At any rate, the petition directs the attention of the United States to the Treaty and to any loss the Indians suffered at the white man's hands respecting the territory described in the Treaty. The petition expressly alleges want of fair and honorable dealings, and that the United States disposed of the lands to settlers and others. We think the petition was adequate to inform the United States that dishonorable dealings might be asserted against it and that it might be held liable for depredations of miners acting under its authority or pursuant to the Treaty it had exacted. We reject the United States argument to the contrary.

III

Appellant also urges an "estoppel" against appellee as regards its pre-taking royalty award for minerals. In 1969, when the Commission was considering what taking date to use, appellee's counsel said that actual mining in the area commenced in the middle '70's, that if the Commission selected 1914 as the taking date, as it then considered doing, appellee would claim the minerals removed before that date as a separate item, but that the 1875 taking date would allow award for the minerals as still in the ground. Manifestly appellee's counsel was ill informed as to what he would later prove. Indian claimants may know they once had a vast domain and now have it not, without being able to supply details as to the steps the expropriation took. Experts must be retained for this and they must be given a taking date to work from. However, this statement was not offered with any accompanying colloquy that would enable us to say it was a stipulation of fact. There is nothing to show it was accepted as such. It is read by appellant as a promissory undertaking: if we can have the 1875 date, we won't claim for minerals removed before 1875 even if there were some. For counsel to give away part of his client's claim in that fashion would be most extraordinary, and the words should be read to avoid such a construction, if possible. They easily can be here. It was simply an unsound and fallacious argument such as we lawyers often utter. If appellant's counsel had been any better informed, he would have exposed the fallacy. The Commission's finding 27, tells why they selected

1875 as the taking date, and the percentage of minerals then in the ground plays no part in the finding. It is agreed that 1875 was not selected by stipulation of counsel.

IV

The record shows that the appellant had ample notice how much appellee was going to claim for pre-taking removal of minerals. This was given on delivery of appellee's appraisal report in January 1971. Appellant refused to try the quantum of such recovery because it chose to rely on its denial of entitlement. See the Commission's order denying motion for rehearing, November 14, 1973, 32 Ind. Cl. Comm. 230.

V

Appellant now says that in the case of the mineral locations, at least, the takings or extinguishments occurred, not January 1, 1875, but on the Treaty date, October 12, 1863, or on the dates of establishment of mining districts, or rather that they so occurred if the taking award of $5,980,122 is not all that is awarded. We assume *arguendo* that appellant does retain a right to challenge the date in spite of the appearance of having committed itself to it, either in gross or in part as an average or composite date, and further that it can do so in this conditional or contingent manner.

There is one legal problem we fail to find adequately addressed by the Commission or by counsel and that is, what interest in the minerals did the Indians part with by the Treaty of Tuilla Valley? Some expressions in the almost indistinguishable companion case of *Western Shoshone Group* v. *United States*, 29 Ind. Cl. Comm. 5, 45, 46 (1972) construe the Ruby Valley Treaty, there involved and containing language like ours, as granting "permanent easements". If the Indians had parted with a "permanent easement" to mine silver it is hard to see how they still had it to be taken away again on the taking or extinguishment date. The most plausible theory would be that as to minerals, by the Treaty, the Indians granted no more than a license. Otherwise, it would seem the mineral value should have been excluded from the taking award, and instead the 20% royalty for breach of fair and honorable dealing in the Treaty should have ap-

plied to all the minerals, whenever removed, until exhaustion. The Commission, of course, in both cases denies that the Treaties extinguished the Indians' interest in the minerals. The mineral locators thus were not, vis-a-vis the Indians, owners of minerals still in the ground, but only of what they had extracted. Such a license theory would explain what the Commission has done and it is consistent with the usual *contra proferentem* rule applied to treaties drafted by Government officials for unlettered Indians to sign. There was no reason for an Indian to think he was granting ownership of minerals still in the ground and likely not even discovered.

As long as the Indians observed the Treaty, did not interfere with the mining operations, and accepted the annual $1,000 refresher as adequate consideration, the miners were not acting adversely to them. Having voluntarily parted with the licenses they did part with, the Indians had no cause of action accruing to them as for a taking until more had happened, *i.e.*, the general taking of January 1, 1875. They were therefore entitled to no more than the Commission has given them, an upward adjustment of the $1,000 per annum to a fair and honorable royalty, for minerals extracted before January 1, 1875.

By this analysis, neither the Treaty, nor the miners' locations, nor the establishment of mining districts, nor the enactment of mining legislation by Congress, can be regarded as anticipating the general taking or extinguishment, and the found date of January 1, 1875, must stand on appellate review for failure of appellant to demonstrate that it is wrong. As in some other cases, an earlier date would no doubt also have been sustainable if found by the Commission. *Gila River Pima-Maricopa Indian Community* v. *United States*, 204 Ct. Cl. 137, 494 F. 2d 1386, *cert. denied*, 419 U.S. 1021 (1974); *United States* v. *Fort Sill Apache Tribe*, 202 Ct. Cl. 134, 480 F. 2d 819 (1973).

VI

United States v. *Northern Paiute Nation*, 203 Ct. Cl. 468, 490 F. 2d 954 (1974), is not contrary to the decision we reach today. That case involved no treaty. The Indians were expelled from the mining area by the armed forces of the

United States. The miners entered adversely to them, with the retrospective backing of United States law. We held that, in the instances of tracts where earlier takings had obviously occurred, an average or composite taking date, used for valuation purposes, was not *res judicata* that taking had occurred only later. The Indians thus had no claim for "trespass damages" after their taking claim was settled. Here we have also an average or composite date, but there are no other taking dates to compete with it, and therefore it must stand.

Moreover, in *Northern Paiute* the record afforded disturbing indications that the Indians were being paid twice for the same thing. In the earlier award, affirmed 183 Ct. Cl. 321, 393 F. 2d 786 (1968), the Commission had valued the tract there involved at $15,750,000 as of a January 1, 1863 taking date. It considered evidence of value calculated from the supposed mineral content of the land on that date, but based the award for the mineral portion primarily on a "sales index of value" constructed from actual purchases and sales of mining rights and mining stock, thus on the miners' speculations. It was undisputed that the speculative fever was high and that values had moved steadily upward since the expulsion of the Indians. The Government claimed credit for values added by the miners since the expulsion. These were considerable: values added by physical structures, by discovery of new ore bodies, and by speculation. We denied this credit on the ground, among others, that no computation had been made or offered as to injury to value by the miners' ravages. The new proceeding, however, in the guise of trespass damages would have assessed liability for the ravages without giving any credit for the values added. There was nothing to show that the removal of ores before the average or composite taking date had reduced the taking award by one dollar. In proportion to the remaining mineral wealth, the pre-taking date removals were relatively small in quantity and wholly secondary to other considerations in the determination of value as found. Where the taker gets no credit for value it has added before the selected taking date, it is surely questionable to assess it for what it has taken away.

Here, however, the pre-taking date removal of minerals has been relatively large and has had its full effect in assessing the taking date value. Both the royalty for pre-taking removals and the fair market value for the remaining ones were found on the basis of actual or estimated quantities and the cost of removal and marketing. The speculations of miners has not been used in the same way as in *Northern Paiute*. Appellant does not urge that the taking award of $5,980,122 is inflated. In the circumstances, it appears to us fair and just that some way be found to compensate the Indians for the pre-taking removals, assuming as we do that in negotiating the Treaty the United States made itself responsible for fair and honorable dealing. Otherwise the Indians are not made whole.

Moreover, the determination of the award at one time on both phases offers assurance that a double payment for the same thing will not be required. Appraisers are aware of this danger when they submit reports on both phases together, and the Commissioners when they hear testimony and make findings on both phases at once. We cannot assume the Commission would knowingly exact payment twice for the same thing, and here it would have been impossible to do so unwittingly.

We cannot demand a theoretically perfect award. These ancient wrongs must be settled for within our lifetimes. It remains true that the artificial postponement of a taking date with values enhanced by the taker's activities, and with felt concomitant necessity to compensate somehow for things that happened earlier, is a technique bound to produce difficulties. Other techniques no doubt present objections too. We must affirm unless the appellant shows us error we are required to correct under the statute, which it has not done here.

VII

This is not a case of "trespass" damages, as the foregoing we hope makes clear, and we pretermit decision on that issue until we are confronted with a case that presents it.

Affirmed.

Syllabus

512 F. 2d 1094

CONTRA COSTA COUNTY FLOOD CONTROL AND WATER CONSERVATION DISTRICT v. THE UNITED STATES

[No. 392–73. Decided March 19, 1975]

ON PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

Contracts; interpretation; agreement re payment of attorneys' fees and expenses; Government refusal to continue payments; estimated costs.—The Soil Conservation Service of the Agriculture Department (Service) made agreements with plaintiff, a state agency, to fund and to supply technical assistance for construction of a channel improvement project pursuant to the Watershed Protection and Flood Prevention Act. The private contractor (H), who was engaged to perform the work, upon completion thereof, sued plaintiff on certain contract claims. Plaintiff and Service entered into an agreement with respect to employment of attorneys and the legal fees for defense of the suit. A significant "whereas" clause stated that "any judgment in favor of the contractor [H] resulting from such action may result in an increase in the cost of construction of said works of improvement for which the Service will be obligated to cost-share with [plaintiff] as an additional cost of construction." The agreement provided, *inter alia*, that plaintiff was to employ attorneys satisfactory to Service, the attorneys' employment contract as well as the legal fees and expenses required approval by Service, the attorneys' contract could be terminated by plaintiff only upon Service's request, Service would provide 100% of the actual cost of attorneys' fees and expenses, and stated the estimated cost of the fees and expenses to be $35,000. Service regularly reimbursed plaintiff in the amounts of the attorneys' bills, but refused further reimbursement after the alleged "limitation" of $35,000 was reached, although plaintiff continued to submit bills for approval. Plaintiff seeks reimbursement from Service of the amount of the legal fees and expenses incurred up to commencement of the present action in excess of $35,000. In view of the common financial interest of plaintiff and Service and Service's substantial control over the defense of the suit, it is *held* that Service implicitly undertook not to jettison plaintiff whenever it might decide to do so and that plaintiff's interpretation that Service was obligated to pay all necessary and proper legal expenditures was the more reasonable one. Plaintiff's motion for summary judgment is granted, defendant's cross-motion is denied, and plaintiff is entitled to judgment. The case is returned to the trial division for further proceedings under Rule 131(c).

Contracts; termination; Government right to terminate, scope of. [1] Where the subject agreement between plaintiff (a state agency)

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and the Soil Conservation Service of the Agriculture Department respecting payment of legal fees arising from defense of a contractor's suit against plaintiff in connection with a flood control project, provided that the attorneys had to be satisfactory to the Service, the attorneys' employment contract had to be approved in advance by the Service, the legal fees and expenses had to be approved by the Service as proper, the attorneys' contract could not be terminated by plaintiff alone but only at the request of the Service, the Service could participate in the litigation to the extent it deemed advisable, including the right to call for an appeal, if necessary, the Service was to pay 100% of the actual cost of the attorneys' fees and expenses, and the Service could assume defense of the suit including removal of the attorneys hired by plaintiff, Federal participation and control in recognition of a common financial interest was not only assured, but in exercising these rights, and absent a termination clause, the Service implicitly undertook not to abandon plaintiff but to see the litigation to its end. That the agreement estimated attorneys' fees and expenses at a stated figure did not impose a maximum for the responsibility of the Service, but was simply a statement that that amount was then anticipated as the total.

United States ⟸ 70(15)

Contracts; interpretation; right to terminate; termination clause, absence of.

[2] Generally, absent a contract termination clause, the exercise by the Government of its right not to approve legal expenditures as provided in an agreement relating to defense of a suit is not the equivalent of a privilege to terminate the agreement at will, particularly where such interpretation is inconsistent with the dominant purpose of the agreement.

United States ⟸ 72(6)

Contracts; interpretation; promise conditional on satisfaction.

[3] Where an agreement gives one of the parties the right of concurrence, approval or acceptance, the usual standard for interpretation of that provision is that concurrence or approval is not left to unbridled discretion but that it can be withheld only if objectively reasonable in the particular circumstances.

Contracts ⟸ 282

Contracts; interpretation; reasonable interpretation.

[4] Bilateral contracts should be applied, if fairly possible, so as not to put one side at the mere will or mercy of the other.

Contracts ⟸ 143(1)

Contracts; interpretation; ambiguity; generally.

[5] Where the language of a contract is ambiguous and the contractor's interpretation is reasonable, the ambiguity will be construed against the Government as the author of the document.

United States ⟸ 70(8)

Opinion of the Court

Interest; claims against the United States; when allowable.

[6] A plaintiff may not recover interest on a contract claim sued on in the Court of Claims unless the right to interest is given by the contract or by statute.

United States ⇐ 110

E. V. Lane, Jr., attorney of record, for plaintiff.

Bernard M. Brodsky, with whom was *Assistant Attorney General Carla A. Hills*, for defendant.

Before DAVIS, KASHIWA, and KUNZIG, *Judges*.

DAVIS, *Judge*, delivered the opinion of the court:

In the 1960's the Soil Conservation Service of the United States Department of Agriculture made agreements (under the Watershed Protection and Flood Prevention Act, 68 Stat. 666, 16 U.S.C. §§ 1001 et seq.) with plaintiff Contra Costa County Flood Control and Water Conservation District, an agency of California, to fund (in large part) and to supply technical assistance for the construction of a channel improvement project in Marsh Creek within Contra Costa County. The Flood Control District was to supervise the construction which was to be performed by Oscar C. Holmes, Inc. (Holmes), a private contractor. After completion of the work Holmes made large claims against the plaintiff which were administratively rejected. Suit was then brought by Holmes on these demands, in 1968, against the Flood Control District in a California state court. The present action concerns, not the details of the Marsh Creek project or the validity of Holmes' claims, but a separate agreement made by plaintiff and the Soil Conservation Service with respect to the legal fees for defending Holmes' suit against the District.

Shortly after Holmes filed its action, the Service and the District made this attorneys-fees contract which declared, in a significant "whereas" clause, that "any judgment in favor of the contractor [Holmes] resulting from such action may result in an increase in the cost of construction of said works of improvement for which the Service will be obligated to cost-share with the Local Organization [the Flood Control District] as an additional cost of construction," and then

proceeded to arrange for the incidence of the lawyers' costs.[1]

At the suggestion and with the approval of the Conservation Service, plaintiff retained a local attorney to represent it in the Holmes litigation. Bills reflecting this lawyer's fees and expenses were submitted by the Flood Control District to the Service which regularly reimbursed the District for them, under the agreement respecting legal expenses, until in September 1970 the Service indicated, for

[1] The relevant parts of the operative provisions of the contract are as follows:

* * * * *

"A. This agreement relates to the employment of Attorneys to represent the Local Organization [the District] in the defense of said lawsuit.

"B. The Local Organization will:

1. Employ Attorneys satisfactory to the [Soil Conservation] Service.
2. Permit the Service to participate to the extent it deems advisable in the preparation for and the trial of such lawsuit, and exercise the right of appeal in such lawsuit if requested to do so by the Service.
3. Prepare and submit itemized billings to the Service covering fees and expenses payable monthly to the Attorneys, and make payments to the Attorneys.

"C. The Service will:

1. Provide 100 percent of the actual cost of the fees and expenses of the Attorneys which have been approved by the Local Organization, with the concurrence of the Service, based on the following fee and expense schedule.

Attorneys' Fees:

$40 per hour, including trial time for Attorney in Charge.

$10 to $25 per hour for each assistant, depending on their experience. Said sums to be computed on basis of one-quarter hour.

Expenses:

Transportation by public carrier.

Subsistence and lodging not to exceed $16 per day.

Personal vehicle mileage at $0.10 per mile.

Costs and disbursements for litigation, including expert witnesses.

Costs for depositions and transcripts.

The above fees and expenses, estimated to be $35,000, shall be itemized and verified by the Attorneys and be supported by proper vouchers or billings.

2. Upon receipt of vouchers or billings, if acceptable, make monthly payments to the Local Organization.

"D. It is mutually Agreed that:

1. The employment agreement between the Local Organization and the Attorneys will be approved by the Service before it is executed; and such agreement will be terminated by the Local Organization only upon the request of the Service.
2. No fees or expenses incurred by the Attorneys in connection with the defense of said lawsuit will be approved for payment by the Local Organization without the concurrence of the Service."

* * * * *

the first time, that it would not pay the plaintiff after the supposed "limitation" of $35,000 was reached. Thereafter the Service paid the legal bills up to the total of $35,000 but refused any further reimbursement, although the District consistently submitted bills for approval in ordinary course. The Service insisted that the plaintiff should pay the bills itself.

The total of legal fees and expenses incurred by plaintiff up to the commencement of the present action (in October 1973) is $58,856.14, of which defendant has reimbursed only $35,000.[2] Plaintiff now seeks the remainder ($23,856.14).[3]

Stressing the contract's repeated references to governmental approval and concurrence (*see* footnote 1, *supra*), defendant takes the position that either (a) the Conservation Service had at all times the plenary and untrammeled right to refuse to pay for legal fees and expenses whenever it decided not to, or (b) at least beyond the so-called "maximum" of $35,000, the Government had that right which it could exercise in its unreviewable discretion. This interpretation, it is said, is the more reasonable construction of the contractual language, and the one which retains in the Government the full right of control which it was the purpose of the agreement to accord.

We cannot accept either of these readings which are contradicted, it seems to us, by the dominant themes, the terms, the structure, and the background of the fee agreement. The Government's primary interest and the main reason why the pact was made are clearly reflected in the "whereas" clause we have quoted above—"any judgment in favor of the contractor [Holmes] resulting from such action may result in an increase in the cost of construction of said works of improvement for which the Service will be obligated to cost-share with the Local Organization [the plaintiff] as an additional cost of construction." In March 1968 when the agreement was

[2] The Holmes lawsuit, which initially sought $600,000, was settled in September 1972 for $150,000, payable by the plaintiff. The present action does not involve any question as to the propriety of this settlement or the share, if any, to be borne by the Conservation Service.

[3] Plaintiff first sought relief through an appeal to the Board of Contract Appeals of the Department of Agriculture. That tribunal dismissed the appeal for lack of jurisdiction. The legal-expenses contract does not contain a Disputes clause or provide for administrative settlement of controversies.

signed shortly after Holmes filed his suit, the United States considered that it might very well have to pay a goodly portion of a judgment favoring Holmes. For that reason it desired, as a potential co-payer, substantial control over the defense of the action—but by the same token it knew it was in the same boat as plaintiff and they would have to float or sink together. The Governments' participation was neither charity nor a mere gratuity. It was, rather, the recognition of a common financial interest. Those are the twin principal threads of the contract—the fortunes of the Conservation Service with respect to the Holmes litigation were directly tied to those of the Flood Control District, and at the same time the Government, since it was to bear the legal costs and be responsible for part of any adverse judgment, was to have important input into and control over the conduct of that litigation.

These fundamental purposes are carried over into the contract's terms—what they say and what they omit to provide. Federal control is obviously assured by the provisions that (a) the attorneys have to be satisfactory to the Conservation Service (paragraph B. 1., *supra*, footnote 1); (b) the attorney's employment agreement must be approved in advance by the Service (paragraph D. 1.); (c) the legal fees and expenses have to be approved by the Service as proper (paragraphs C. 1.; D. 2.); (d) the attorney's contract cannot be terminated by the District alone, but only if the Service so requests (paragraph D. 1.); and (e) the Service can participate in the Holmes litigation "to the extent it deems advisable," including the right to call for an appeal (if necessary) (paragraph B. 2.).

These are significant rights, but all are quite consistent with the view that, in exercising them, the Federal Government could not wash its hands of the litigation and leave the District to sink or swim alone. The United States had the upper hand because it was to bear the expense, but it is implicit that it also undertook not to leave the District in a lurch but to see the litigation to its end.[4] We think this is shown, negatively, by the absence of any form of termination clause

[4] Seeing the Holmes litigation through to its end would not, of course, preclude a settlement, which is one important form of ending a lawsuit.

in the contract,[5] and, affirmatively, by the combination of the provisions that the Service was to pay "100 percent of the actual cost of the fees and expenses of the Attorneys which have been approved by the Local Organization, with the concurrence of the Service" (paragraph C. 1.), and that the Service could take over the whole defense of the lawsuit, including the removal of the attorneys hired by the plaintiff (paragraphs B. 2.; D. 1.) The United States was not required to pay outside legal costs if it considered that they were mounting too high, but its alternative was to assume the suit's defense—not to withdraw from the arena, as it did, and allow the District to incur and pay the legal costs for itself as if the District alone were concerned with the outcome.

In response, defendant stands squarely, first, on the provision that the legal fees and expenses are "estimated to be $35,000" (paragraph C. 1., end), which the Government takes to be the upper limit of its mandatory responsibility; and, second, on the several indications that the Service has to approve or accept or concur in the legal costs, if they are to be paid (paragraphs C. 1.; C. 2.; D. 2.). In literal terms the $35,000 clause does not impose a maximum or say any more than that that amount was then anticipated as the total, and there is insufficient ground for expanding it to establish a definite maximum for the responsibility of the United States. The record contains no authoritative or even satisfactory explanation for its inclusion,[6] and to read it as an upper limit on the participation of the Federal Government alone would run directly against paragraph D. 2., which prohibits the plaintiff from paying the lawyers any fees or expenses "without the concurrence of the Service." If $35,000 was a maximum, it was necessarily a restriction for the Dis-

[5] Defendant admits that there is no explicit termination clause of any kind but argues that exercise of the right not to approve legal expenditures is the equivalent of a privilege to terminate at will. As we point out *infra*, that is not the normal interpretation of a mere right-of-approval, and in this instance it would be inconsistent with the dominant purposes of the agreement.

[6] An affidavit by an employee of plaintiff suggests that $35,000 "represented the amount of money allocated to other projects which could be diverted and made available at the time of said Agreement [the contract in suit] to finance the defense of the Holmes' litigation."

trict as well as for the Service—but this was certainly not the position taken by the Service when it reiterated that the District alone was to bear the excess. And if $35,000 was such an overall limitation, then it would seem that the Service should have called for the termination of the lawyers' contract (paragraph D. 1.) and itself taken over the defense of the Holmes action (paragraph B. 2.). Otherwise the District would have been left foundering, contrary to one of the prime purposes of the agreement which was to tie the plaintiff and the Service securely together.

As for the references to Service concurrence, approval or acceptance, they are easily understood as calling upon the Government to monitor the claimed legal fees and expenses for excessiveness, needless expenditures, insufficient proof, etc. The usual standard is that concurrence or approval is not left to unbridled discretion but can be withheld only if objectively reasonable in the particular circumstances, particularly when the item contracted for is not one which can be evaluated only on the basis of personal taste or fancy. *See, e.g. Ard Dr. Pepper Bottling Co.* v. *Dr. Pepper Co.*, 202 F. 2d 372, 377 (C.A. 5, 1953); 5 WILLISTON CONTRACTS § 675B (3d ed. 1961). The concurrence requirements in this case lend themselves readily to that interpretation. The United States was to be in a position to prevent itself from being "taken for a ride" by excessive or unecessary outlays,[7] but it was not to be free to reject necessary and reasonable legal expenditures—unless it was willing to end the private attorneys' services and itself assume the defense of the Holmes case.[8]

[7] In providing that even the District could not pay the lawyers any fees or expenses without the Service's concurrence, paragraph D. 2. strongly supports the conception that the provisions for concurrence-approval-acceptance were designed to keep legal costs within proper bounds, not to accord the Service an unchecked discretion to reject reasonable costs.

[8] The contract in *Northwest Marine Iron Works* v. *United States*, 203 Ct. Cl. 629, 493 F. 2d 652 (1974)—on which defendant relies—made it absolutely clear that the Government had the plenary right to decide whether a certain type of insurance should be purchased by the contractor or whether the Government would itself assume the risk of loss. 203 Ct. Cl. at 636–37; 493 F. 2d at 656–57. Even if we discount the plain difference in wording, the decision does not at all support defendant; the analogy to the current case is that the Soil Conservation Service had the election to pay reasonable and proper legal costs or to take over the defense of the Holmes suit. In fact it chose to do neither.

We think that in this way the separate provisions of the agreement can be harmonized with its major purposes, so as to hold the United States to its original undertaking, in March 1968, not to jettison the District whenever it might decide to do so.[9] Bilateral contracts should be applied, if fairly possible, so as not to put one side at the mere will or mercy of the other. *Padbloc Company* v. *United States*, 161 Ct. Cl. 369, 376–77 (1963); *Deloro Smelting & Refining Co.* v. *United States*, 161 Ct. Cl. 489, 496–97, 317 F. 2d 382, 387 (1963).

This coordination of the various terms of the agreement seem to us distinctly preferable, even without the *contra proferentem* rule, to the Government's understanding that it had all (or nearly all) the rights and practically no responsibilities. But if the contract be deemed more ambiguous and less clear, then the usual canon should be invoked. *Sturm* v. *United States*, 190 Ct. Cl. 691, 697, 421 F. 2d 723, 727 (1970). The Government presented plaintiff with the form of the agreement, and the plaintiff's interpretation was at least reasonable, if not in fact the better one.

The plaintiff's motion for summary judgment is granted, the defendant's is denied, and plaintiff is entitled to judgment. We return the case for further proceedings under Rule 131(c), with respect to the amount of recovery, because defendant, which has hitherto rested wholly on its alleged unqualified right to refuse reimbursement,[10] may possibly wish to question the propriety or necessity of some of the expenditures.[11]

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[9] There is some indication in a letter from an Assistant Secretary of Agriculture, in April 1972, rejecting the District's request for payment that by that date the Government had concluded, from the ongoing development of the grounds of the Holmes litigation, that even if Holmes obtained a judgment the Government would not be liable to the District for any part of it.

[10] There has been no suggestion, thus far in this lawsuit, that any of the expenditures in suit were improper.

[11] Plaintiff asks for interest but neither the contract nor any statute provides for it in this instance, and it cannot be allowed. *United States* v. *Thayer-West Point Hotel Co.*, 329 U.S. 585 (1947).

Syllabus

513 F. 2d 1234

ANNE H. HAMPTON, INDIVIDUALLY, AND AS EXECUTRIX OF THE ESTATE OF FREDERICK JORDAN HAMPTON, DECEASED v. THE UNITED STATES

[No. 126–73. Decided March 19, 1975]

ON PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

Taxes; income tax; claim for refund; civil action for refund; statute of limitations; income in respect of decedents; members of Armed Forces on death.—This is a suit for recovery of Federal income taxes, plus interest, which plaintiff, widow of Air Force Colonel Frederick J. Hampton, alleges constitutes an overpayment for calendar years ending December 31, 1963 and 1964, as to which years they filed joint income tax returns in April 1964 and 1965, respectively. From April to December 1953, Col. Hampton performed active duty in Korea. Between the Korean conflict and the Vietnam war Col. Hampton served in various noncombat military assignments. On November 3, 1967 he was assigned to duty in Vietnam. Both Korea and Vietnam by Executive Orders had been designated a combat zone for purposes of certain provisions of the respective 1939 and 1954 Internal Revenue Codes. In March 1968 Col. Hampton was killed in action in Vietnam. On January 2, 1970 plaintiff filed claims for refund of the 1963 and 1964 taxes, relying on 26 U.S.C. § 692; the Internal Revenue Service disallowed the claims as untimely. Plaintiff's suit was filed on April 14, 1973. By way of defense, defendant claims that this court lacks jurisdiction to entertain plaintiff's suit because she failed to file timely claims for refund as required by § 7422(a), the applicable period of limitations being prescribed by §§ 6511 and 7508(a)(1)(E). The issue before the court is whether § 6511 applies to claims for refund filed pursuant to § 692 respecting income of decedent active members of the Armed Forces. Plaintiff contends that § 692(1), by its terms, provides for recovery of taxes with respect to *all* taxable years from the date of first service in a combat zone after June 24, 1950 through the date of death in the same or another combat zone, which in the case of Col. Hampton embraced 1953 through 1968. Defendant contends that claims for refunds may be maintained only for those tax years open at the time of death under § 6511(a), and that the only relief from § 6511(a) limitations in the case of a serviceman dying in combat is that accorded by § 7508. Upon a review of the legislative history of and intent in enacting § 692 and its predecessor, including the provision conditioning relief to service in a "combat zone," and under the circumstances of this case, it is *held* that since § 692(1) provides for cancellation of tax liability only for years

Syllabus

of actual, continuous combat service from the time a serviceman first entered the combat zone until his subsequent death therein, and since § 696(2) provides only for forgiveness of taxes for prior years which remain unpaid at the serviceman's death, to allow plaintiff to recover taxes for years of noncombat service (1963 and 1964) prior to decedent's combat zone assignment to Vietnam in 1967, would provide plaintiff with a windfall and would stretch the relief afforded by § 692 beyond the intended bounds. Accordingly, plaintiff's tax refund claims for 1963 and 1964 were technically barred by § 6511(a), and even if plaintiff were able to overcome the limitations barrier, the refund claims would have to be disallowed on the merits. Plaintiff's motion for summary judgment is denied, defendant's cross-motion is granted and the petition is dismissed.

Taxes; income tax; estates, trusts, beneficiaries and decedents; income in respect of decedents; members of Armed Forces on death; limitation of actions.

[1] 26 U.S.C. § 692 does not by its terms provide for a period of limitations different from that prescribed for refund claims generally under § 6511(a). Section 692(1) establishes only the outer limits of available relief under this special tax forgiveness provision.

Internal Revenue ⇐ 1970

Taxes; Court of Claims jurisdiction; claim for refund; income in respect of Armed Forces members on death; limitations on filing claim for refund.

[2] Absent an express measure excepting tax refund claims under 26 U.S.C. § 692 from the operation of the general statute of limitations, 26 U.S.C. § 6511(a), it is not within the province of the Court of Claims to except such claims from the application of § 6511(a).

Internal Revenue ⇐ 1970

Taxes; claims for refund; income in respect of Armed Forces members on death; limitation of actions.

[3] There are clear indications in the legislative history of 26 U.S.C. § 692 to support the view that claims for tax refund brought thereunder must be filed within the period of limitations provided by § 6511(a).

Internal Revenue ⇐ 1970

Statutes; construction and operation; general v. specific provisions.

[4] Generally, where general provisions, terms or expressions in one part of a statute are inconsistent with more specific or particular provisions in another part, the specific provisions must control. However, rules of statutory construction are useful only insofar as they give guidance to courts in discovering the legislative intent, and where the intent is otherwise manifest resort to general maxims or principles of statutory construction is of dubious value.

Statutes ⇐ 207

Syllabus

Taxes; income tax; estates, trusts, beneficiaries and decedents; income in respect of decedents; members of Armed Forces on death; limitation of actions.

[5] There is no conflict or inconsistency inherent in the terms of 26 U.S.C. § 692(1) and § 6511(a) since the time period of § 692(1) providing for refund of taxes for years as early as 1950 merely defines the extent or scope of refund claims authorized under that section, whereas § 6511(a), by its nature, limits the time period for the *enforcement* of such a claim.

Internal Revenue ⇐ 1970

Taxes; income tax; estates, trusts, beneficiaries and decedents; income in respect of decedents; members of Armed Forces on death.

[6] The "refund of an overpayment" language of § 692(2) applies only with respect to claims for relief under that subparagraph and not to claims arising under § 692(1) from which the language is absent. The legislative history indicates that the reason for the omission is based on the assumption that taxes for the years for which § 692(1) provides forgiveness would not be paid in the first place and, accordingly, that refunds for those taxes would not be required. Thus, when taxes for years covered by § 692(1) are in fact paid, the legislative history of § 692 is clear that Congress intended the deceased serviceman's estate to recover those taxes by filing a claim for "refund of an overpayment."

Internal Revenue ⇐ 1965

Taxes; civil actions or suits for refund of taxes; claims for refund; necessity for filing.

[7] The filing of a claim for refund or credit with the Secretary of the Treasury as provided in 26 U.S.C. § 7422(a) is a condition precedent to the maintenance of a suit for the recovery of any wrongfully assessed tax or penalty or of any sum alleged to have been excessive or in any manner wrongfully collected. This requirement applies to a claim for refund of an overpayment under 26 U.S.C. § 692(1).

Internal Revenue ⇐ 2024

Taxes; limitation of actions; civil actions or suits for refund of taxes; generally.

[8] 26 U.S.C. § 6511(a) does not limit its application to taxes for which a return is required.

Internal Revenue ⇐ 2062

Taxes; income tax; estates, trusts, beneficiaries and decedents; income in respect of decedents; members of Armed Forces on death; tax return; necessity for filing.

[9] The terms of 26 U.S.C. § 692 cancelling liability for the "tax imposed" do not relieve taxpayers of the obligation of filing tax returns otherwise required under 26 U.S.C. § 6012.

Internal Revenue ⇐ 1352

Syllabus

Taxes; income tax; estates, trusts, beneficiaries and decedents; income in respect of decedents; members of Armed Forces on death; legislative intent.

[10] Congress intended 26 U.S.C. § 692(1) to cancel tax liability for years in actual, continuous combat service from the time a serviceman first entered the combat zone until his subsequent death therein. Since § 692(1) relates solely to years in combat service, § 692(2) which refers to "taxable years preceding those specified in paragraph (1)" must accordingly relate to all years prior to the date in which a serviceman entered combat.

Internal Revenue ⇐ 869

Taxes; statutes; construction and operation; income in respect of decedents; members of Armed Forces on death.

[11] Subparagraphs (1) and (2) of 26 U.S.C. § 692 should be construed together with other related provisions of the 1954 Code which afford special tax treatment to members of the Armed Forces serving in combat.

Internal Revenue ⇐ 869

Taxes; revenue laws; procedure and administration; time for performing certain acts postponed by war.

[12] The postponement of time for performing certain acts by reason of war provided in 26 U.S.C. § 7508 applies to filing of tax returns, payment of any tax, assessment of any tax and commencement of any suit, and expressly authorized is relief from the period of limitations for filing a claim for credit or refund.

Internal Revenue ⇐ 1970

Taxes; statutes; construction and operation; legislative intent; income in respect of decedents; members of Armed Forces on death.

[13] The total legislative scheme of 26 U.S.C. § 692 and other related provisions of the 1954 Internal Revenue Code affording special tax treatment to members of the Armed Services serving in combat is geared to accommodate the exigencies of war. The terms of § 692(1) contemplate that a serviceman's pay has not been included in gross income, that his combat pay was not subject to withholding, that he did not file any tax return, and that he did not pay any taxes, and the language that "any tax under this subtitle shall not apply" was intended to be applicable with respect to years for which there was no obligation to file returns or pay taxes. By comparison, the language of § 692(2) that any tax "which is unpaid at the date of his death (including interest, additions in the tax, and additional amounts) shall not be assessed" assumes that the serviceman has an outstanding tax liability which remains unpaid at the date of his death, and must refer solely to years prior to combat service.

Internal Revenue ⇐ 869

Opinion of the Court

Taxes; statutes; construction and operation; income in respect of decedents; members of Armed Forces on death; legislative history.

[14] There is nothing in the legislative history of 26 U.S.C. § 692(1) suggesting that Congress intended it to provide tax relief for years of noncombat service which intervene two tours of combat duty in different combat zones, but on the contrary such indications as there are show that relief was to be limited to years of actual combat service from the date of first entry into a combat zone until subsequent death therein.

Internal Revenue ⇐ 869

Taxes; income tax; estates, trusts, beneficiaries and decedents; income in respect of decedents; members of Armed Forces on death.

[15] The terms of 26 U.S.C. § 692 were written to apply to combat deaths after June 24, 1950, no expiration date being included probably because such date became operative or inoperative by Executive Order. Thus, there was no need to enact special legislation or to amend the statute to provide relief to the estates of servicemen killed in Vietnam and the terms of the statute became operative upon the President's designation of Vietnam as a "combat zone."

Internal Revenue ⇐ 869

Taxes; limitation of actions; income in respect of decedents; members of Armed Forces on death.

[16] Under Pub. L. 93-597 the forgiveness of taxes has been extended to cover the years a serviceman is in missing status following his actual death and the limitations period is held open as to refund claims for any taxable year ending on or after February 28, 1961. This is persuasive support for the view that Congress did not intend the estates of servicemen dying in Vietnam to recover income taxes, pursuant to § 692(1) for taxable years prior to years of service in that combat zone.

Internal Revenue ⇐ 869

Sherwin P. Simmons, attorney of record, for plaintiff, *Trenam, Simmons, Kemker, Scharf & Barkin*, of counsel.

Laurence J. Whalen, with whom was *Assistant Attorney General Scott P. Crampton*, for defendant. *Gilbert E. Andrews and Joseph Kovner*, of counsel.

Before DURFEE, *Senior Judge*, KASHIWA and KUNZIG, *Judges*.

DURFEE, *Senior Judge*, delivered the opinion of the court:

In her individual capacity and as executrix of the estate of her deceased husband, plaintiff brings this action to re-

cover federal income taxes paid for the calendar years ending December 31, 1963, and December 31, 1964. The issue we are called upon to decide is whether the statute of limitations generally applicable to tax refund claims applies to claims for refund filed pursuant to § 692 of the Internal Revenue Code of 1954. The case is before us on the parties' motions for summary judgment; the pertinent and controlling facts are not in dispute.

Plaintiff is the widow of Colonel Frederick J. Hampton, a career officer in the United States Air Force. From April to October 1953, Colonel Hampton performed active military duty in Korea. Pursuant to Executive Order No. 10195,[1] that Asian country had been designated in 1950 as a "combat zone" for the purposes of certain provisions of the Internal Revenue Code of 1939.[2] Between the Korean conflict and the Vietnam war Colonel Hampton served in various noncombat military assignments. On November 3, 1967, he was assigned to duty with the 311th Air Command Squadron in the Republic of Vietnam, which, since 1964 and pursuant to Executive Order No. 11216,[3] had been classified as a "combat zone" for the purposes of certain provisions of the Internal Revenue Code of 1954 (hereinafter "Code").[4]

On or about March 6, 1968, Colonel Hampton was killed in action.

Plaintiff and Colonel Hampton filed joint federal income tax returns for the years 1963 and 1964, reporting tax liabilities of $2,468.17 and $2,928.00, respectively. Relying upon § 692 of the Code, plaintiff filed claims with the Internal Revenue Service on January 2, 1970, for the refund of these amounts. The determination was made that plaintiff had not filed for the refund within the time prescribed by law, and her claims were therefore disallowed. On April 16, 1973, plaintiff submitted her petition to this court. The United States asserts, by way of defense, that the court lacks jurisdiction to entertain plaintiff's action because her claims for

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[1] 3 C.F.R. 1949–1953 Comp., p. 373.

[2] *E.g.*, sections 22(b)(13), 154 and 3804(f) of the 1939 Code. 26 U.S.C. §§ 22(b)(13), 154, 3804(f) (1952 ed.).

[3] 3 C.F.R. 1964–1965 Comp., p. 301.

[4] *E.g.*, sections 112, 692 and 7508 of the 1954 Code.

refund were not filed within the applicable period of limitations.[5]

Section 692 of the Code—the basis for plaintiff's claimed entitlement—provides as follows:

> § 692. Income taxes on members of Armed Forces on death.
>
> In the case of any individual who dies during an induction period (as defined in section 112(c)(5)) while in active service as a member of the Armed Forces of the United States, if such death occurred while serving in a combat zone (as determined under section 112) or as a result of wounds, disease, or injury incurred while so serving—
>
> (1) any tax imposed by this subtitle shall not apply with respect to the taxable year in which falls the date of his death, or with respect to any prior taxable year ending on or after the first day he so served in a combat zone after June 24, 1950; and
>
> (2) any tax under this subtitle and under the corresponding provisions of prior revenue laws for taxable years preceding those speicfied in paragraph (1) which is unpaid at the date of his death (including interest, additions to the tax, and additional amounts) shall not be assessed, and if assessed the assessment shall be abated, and if collected shall be credited or refunded as an overpayment.

Paragraph (1) provides that a serviceman who dies while serving in a combat zone shall not be subject to income taxes for the year of his death, or for any prior taxable year ending on or after the first day he so served in a combat zone after June 24, 1950. The tax liability with respect to those years is cancelled. If taxes for the years ending on or after the date of first service in a combat zone have been paid, then a claim for refund of those taxes is cognizable under

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[5] The United States grounds its defense on § 7422(a) of the Code, which provides:

"§ 7422. Civil actions for refund.

"(a) No suit prior to filing claim for refund.—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof."

paragraph (1). It is under its ambit that plaintiff seeks repayment of the 1963 and 1964 amounts paid.

Paragraph (2) of section 692 authorizes additional tax relief in the case of a serviceman who dies while serving in a combat zone. It applies with respect to years preceding those specified in paragraph (1), that is, with respect to any years prior to first service in a combat zone. Any tax for those years which remains unpaid at the date of the serviceman's death shall not be assessed or collected; if such unpaid taxes are collected, they shall be credited or refunded as an overpayment. It will be observed that the tax forgiveness authorized by paragraph (2) has no bearing in this case because the 1963 and 1964 taxes here in question were not unpaid at the date of Colonel Hampton's death. *See Wallace* v. *United States*, 127 Ct. Cl. 701, 704, 119 F. Supp. 205, 206 (1954).

The disputed issue here is whether plaintiff's claims under § 692(1) for the refund of Colonel Hampton's 1963 and 1964 taxes were barred by § 6511(a) of the Code, the statute of limitations generally applicable to tax refund claims. Under § 6511(a) a taxpayer must file a claim for refund of an overpayment within 3 years from the time the return was filed or within 2 years from the time the tax was paid, whichever of such periods is the last to expire.[6] It is plaintiff's contention that § 692(1), by its terms, provides for the recovery of taxes with respect to *all* taxable years from the date of first service in a combat zone after June 24, 1950 through the date of death in the same or another combat zone. In the case of Colonel Hampton, this period embraces all calendar years from 1953 through 1968, though only calendar years 1963 and 1964 are involved in this action. Plaintiff maintains that the application of § 6511(a) limitations to defeat refund claims under § 692 would frustrate clearly expressed congres-

[6] Section 6511(a) provides, in pertinent part, as follows:

"§ 6511. Limitations on credit or refund

"(a) Period of limitation on filing claim.—Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid. * * *."

sional intent and would be contrary to the benevolent purposes served by § 692. The specific arguments advanced by plaintiff in support of this reasoning will be discussed, *infra*. According to the Government's theory, Congress did not provide for automatic tax refunds under § 692 for all years prior to combat death starting with 1950. Rather, claims for refunds may be maintained only for those tax years open at the time of death under § 6511(a). The Government contends that the only relief from the § 6511(a) period of limitations in the case of an individual dying in combat is that accorded by § 7508 of the Code, which generally provides servicemen in combat with an extension of time for performing various acts under the revenue laws, including the filing of returns, the payment of taxes, and the filing of a claim for a credit or refund of any tax.

For the reasons hereinafter discussed, we have concluded that plaintiff is not entitled to recover, and accordingly, the petition must be dismissed.

I

In construing these provisions of the income tax Code it is our duty to ascertain and effectuate the intent of Congress. Section 692 does not by its terms provide for a period of limitations different from that prescribed for refund claims generally under § 6511(a), nor are the refund claims authorized under § 692 expressly excepted from the application of § 6511(a) limitations. It is quite true that paragraph (1) of 692 authorizes relief from federal income taxes for any year on or after the first day a serviceman performed duty in a combat zone after June 24, 1950. But we read these terms of paragraph (1) only as establishing the outer limits of available relief under this special tax forgiveness provision. It is not our view that these terms expressly or impliedly manifest an intent on the part of Congress to dispense with the statute of limitations requiring tax refund claims to be filed within 3 years from the time the return was filed or within 2 years from the time the tax was paid. Absent some clear expression of legislative intent, it is not within our province to except refund claims filed pursuant to § 692 from

the application of the general statute of limitations. *Cf. United States* v. *Zacks*, 375 U.S. 59 (1963).

There are clear indications in the legislative history to support the view that claims for refund brought under § 692 must be filed within the period of limitations provided by § 6511(a). The first relief statute similar to § 692 enacted during World War II—§ 421 of the Internal Revenue Code of 1939 [7]—authorized forgiveness from the income tax which would otherwise apply for the taxable year in which an individual died in active service as a member of the military. It also relieved the estate of such a serviceman from liability for taxes unpaid at the date of death. By the Act of August 5, 1947, 61 Stat. 778, Congress amended the World War II provision to broaden its relief.[8] In the case of an individual who died on or after December 7, 1941, and prior to January 1, 1948, while in the armed services, § 421, as amended, provided for cancellation of tax liability with respect to the taxable year in which falls the date of his death, and with respect to any prior taxable year ending on or after December 7, 1941, during any part of which he was a member of

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[7] Internal Revenue Code of 1939, 26 U.S.C. (1946 ed.), § 421, 57 Stat. 149. Section 421 provided:

"In the case of any individual who dies on or after December 7, 1941, while in active service as a member of the military or naval forces of the United States or of any of the other United Nations and prior to the termination of the present war as proclaimed by the President, the tax imposed by this chapter shall not apply with respect to the taxable year in which falls the date of his death, and the tax under this chapter and under the corresponding title of each prior revenue law for preceding taxable years which is unpaid at the date of his death (including interest, additions to the tax, and additional amounts) shall not be assessed, and if assessed the assessment shall be abated, and if collected shall be credited or refunded as an overpayment."

[8] The amended version of § 421 (26 U.S.C.) (1946 ed., Supp. II), 61 Stat. 778, provided, in pertinent part, as follows:

"In the case of any individual who dies on or after December 7, 1941, while in active service as a member of the military or naval forces of the United States or of any of the other United Nations and prior to January 1, 1948—

"(a) the tax imposed by this chapter shall not apply with respect to the taxable year in which falls the date of his death, or with respect to any prior taxable year (ending on or after December 7, 1941) during any part of which he was a member of such forces; and

"(b) the tax under this chapter and under the corresponding title of each prior revenue law for taxable years preceding those specified in clause (a) which is unpaid at the date of his death (including interest, additions to the tax, and additional amounts) shall not be assessed, and if assessed the assessment shall be abated and if collected shall be credited or refunded as an overpayment."

the armed forces. The amended version also retained the provision for forgiveness of income taxes which were unpaid at the date of death.

In order to make this additional relief available to all servicemen who had died on or after December 7, 1941, or who were to die after the amendment and prior to January 1, 1948, Congress passed a special transitional period of limitations as section 2 of the Act of August 5, 1947 (61 Stat. 778). It provided as follows:

> Sec. 2. If at any time prior to January 1, 1948, the allowance of a credit or refund of an overpayment of the tax for any taxable year specified in section 421(a) of the Internal Revenue Code (as amended by this Act) is prevented (except for the provisions of section 3801) by the operation of any law or rule of law, a credit or refund of the overpayment of such tax to the extent that the overpayment is attributable to the change in law made by this Act may, nevertheless be allowed or made if a claim therefor is filed before January 1, 1949.

The House Report associated with this amendment clearly indicates that it was Congress' intention to provide relief from the otherwise applicable statute of limitations for filing refund claims. The Report stated as follows:

> Section 2 of the bill extends the time for filing a claim for credit or refund of an income tax paid by a member of the armed forces dying while in service with respect to the taxable year in which falls the date of his death, or with respect to any prior taxable year (ending on or after December 7, 1941) during any part of which he was a member of such forces. If the allowance of credit or refund of such an overpayment is barred prior to January 1, 1948 (*by the statute of limitations*, or any other law or rule of law), section 2 of the bill provides that credit or refund of the overpayment to the extent that the overpayment is attributable to the change in law made by the bill may be allowed or made if claim therefor is filed before January 1, 1949. [Emphasis added.] [H.R. Rep. No. 1006, 80th Cong., 1st Sess. 2.]

The practical effect of section 2 was to reopen the period of limitations regarding claims for credit or refund of overpayments for taxable years which were closed at the time this law was passed on August 5, 1947, and to hold such years open through December 31, 1948.

When Congress reenacted this tax forgiveness measure at the beginning of the Korean war,[9] it dropped the special exception from the statute of limitations. There is no reference made to any conflict between the Korean war equivalent of § 692 and the statute of limitations provisions of § 6511 (a), nor is there any indication of an intent to cause the period of limitations to be computed differently in the case of a refund of an overpayment under this section than in the case of refund claims generally. We are compelled to conclude in light of this legislative background that, absent an express measure excepting tax refund claims under § 692 from the operation of the general statute of limitations, the limitations period therein prescribed was intended to apply. *Cf. United States* v. *Zacks*, *supra*, at 64–67.

There is additional evidence in the legislative record of this statute which demonstrates that Congress considered claims under § 692 to be subject to the general statute of limitations. Section 692 was recently amended by Public Law No. 93–597, § 4 (January 2, 1975) with respect to years ending on or after the commencement of hostilities in Vietnam, February 28, 1961, to provide that relief under that section would not be lost due to a determination that a serviceman had died several years earlier but had mistakenly been classified as missing in action. Section 4(c) of the Act provided for a special exception to the operation of the statute of limitations, as follows:

> (c) REFUNDS AND CREDITS RESULTING FROM SECTION 692 OF CODE.—If the refund or

[9] It was the Korean war measure which first conditioned relief to service in a "combat zone." Section 154 of the 1939 Code (26 U.S.C.) (1952 ed.), 65 Stat. 452, provided:

"In the case of any individual who dies after June 24, 1950, and prior to January 1, 1954, while in active service as a member of the Armed Forces of the United States, if such death occurred while serving in a combat zone (as determined under section 22(b)(13)) or as a result of wounds, disease, or injury incurred while so serving—

"(a) the tax imposed by this chapter shall not apply with respect to the taxable year in which falls the date of his death, or with respect to any prior taxable year ending on or after the first day he so served in a combat zone after June 24, 1950; and

"(b) the tax under this chapter and under the corresponding title of each prior revenue law for taxable years preceding those specified in clause (a) which is unpaid at the date of his death (including interest, additions to the tax, and additional amounts) shall not be assessed, and if assessed the assessment shall be abated, and if collected shall be credited or refunded as an overpayment."

> credit of any overpayment for any taxable year ending on or after February 28, 1961, resulting from the application of section 692 of the Internal Revenue Code of 1954 (as amended by subsection (a) of this section) is prevented at any time before the expiration of one year after the date of the enactment of this Act by the operation of any law or rule of law, but would not have been so prevented if claim for refund or credit therefor were made on the due date for the return for the taxable year of his death (or any later year), refund or credit of such overpayment may, nevertheless, be made or allowed if claim therefor is filed before the expiration of such one-year period.

It is obvious that such a provision would be unnecessary if Congress did not recognize the usual period of limitations to apply to refund claims under § 692.

II

Several arguments are pressed by plaintiff in support of her contention that the § 6511(a) period of limitations is not applicable in any respect to claims for recovery arising under § 692(1). Plaintiff first of all postulates that the terms of § 6511(a) and of § 692(1) are inconsistent and in conflict with each other. Reliance is placed upon the established canon of statutory construction that where general provisions, terms or expressions in one part of a statute are inconsistent with more specific or particular provisions in another part, the particular provisions must control. It is plaintiff's argument that the broader, more general language of the statute of limitations must yield to the specific terms of § 692(1) providing for refund of taxes for years as early as 1950. In the first place, there is no conflict or inconsistency inherent in the terms of these two sections of the Code: the time period embodied in § 692(1) merely defines the extent or scope of claims authorized under that section, whereas the statute of limitations, by its nature, limits the time period for the *enforcement* of such a claim. Additionally, while we do not gainsay the importance of rules of statutory construction, the limited scope of such "rules" must be kept in mind. They are useful only insofar as they give guidance to courts in discovering the legislature's intent. But where the legis-

lative intent is otherwise manifest, resort to general maxims or principles of statutory construction is of dubious value. Here, as discussed *supra*, the legislative record makes clear that Congress did not intend to exclude refund claims under § 692 from the operation of the general statute of limitations. The rule of construction urged by plaintiff—adherence to which would produce a result plainly at variance with the expressed legislative intent—must be rejected.

Plaintiff next directs our attention to the fact that § 692 is physically arranged in two separate paragraphs, each of which provides a different and distinct form of tax relief. At the end of paragraph (2), which authorizes forgiveness of any tax unpaid at the time of a serviceman's death, it is provided that any such unpaid taxes which are subsequently paid shall be credited or "refunded as an overpayment." It is conceded by plaintiff that this language, *as to claims for relief under paragraph* (2), invokes the general statute of limitations in § 6511(a), which governs limitations for claims "for credit or refund of an overpayment." However, plaintiff objects to the Government's reliance on this language of paragraph (2) to invoke the general statute of limitations against claims for refund arising under paragraph (1). It is plaintiff's contention that these terms of paragraph (2) in no way operate to circumscribe the remedies available to enforce the "absolute right" (plaintiff's words) to recover taxes under paragraph (1).

It appears that plaintiff is correct in the assertion that the "refund of an overpayment" language of paragraph (2) applies only with respect to claims for relief under that paragraph, and not with respect to claims arising under paragraph (1).[10] It is also true, as the plaintiff points out, that paragraph (1) has no language similar to that in paragraph (2) providing that taxes which have been paid shall be "refunded as an overpayment." But in our view there is a logical reason for the omission. As will appear from an analysis of

[10] This conclusion is supported by the language and structure of § 692. *See Wallace v. United States*, 127 Ct. Cl. 701, 704, 119 F. Supp. 205, 206 (1954), wherein the court stated: "The language at the end of * * * paragraph [2] about crediting or refunding taxes unpaid at the date of death must have to do with cases where information as to the death of the soldier was delayed, or where, in ignorance of the law, the taxes were paid after his death."

the total legislative plan providing relief from the revenue laws for servicemen in combat, to be discussed *infra*, it is generally assumed that taxes for the years for which paragraph (1) provides forgiveness would not be paid in the first place and, accordingly, that refunds for those taxes would not be required. In any event, when taxes for years covered by paragraph (1) *are in fact paid*, it is clear from the legislative history of § 692 that Congress intended the taxpayer's estate to recover those taxes by filing a claim for the "refund of an overpayment." The special transitional period of limitations established by the 1947 amendment to the World War II version of § 692 provided for "the allowance of a credit or *refund of an overpayment of the tax for any taxable year specified in section 421(a)* [the equivalent of paragraph (1) of § 692]." [Emphasis added.] We are compelled to reject plaintiff's contention that claims for the refund of taxes paid for years covered by paragraph (1) of § 692 are not required to be filed as claims for the "refund of an overpayment." [11]

Plaintiff's argument that refunds under § 692(1) are governed by the 6-year period of limitations prescribed in 28 U.S.C. § 2401, the general statute of limitations for civil actions against the United States, is based upon the incorrect assumption that the filing of a claim for the "refund of an overpayment" is not required under § 692(1). Moreover, the filing of a claim for refund or credit with the Secretary of the Treasury is a condition precedent to the maintenance of any suit for the recovery of any wrongfully assessed tax, penalty or "of *any sum* alleged to have been excessive or *in any manner* wrongfully collected." [Emphasis added.] Int. Rev. Code of 1954, § 7422(a).[12] We have no doubt that the all inclusive "any sum" and "in any manner" language embraces taxes sought to be recovered under § 692(1). Plaintiff's argument for avoidance of the requirement of filing a refund claim with the Secretary—thereby to avoid the shorter period of limitations imposed on the filing of refund

[11] The Treasury Regulations also provide that if taxes for years covered by § 692(1) are collected the amount so collected "shall be credited or refunded as an overpayment." Treas. Reg. § 1.692–1(a)(1). And *see* Rev. Rul. 69–301, 1969–1 CUM. BULL. 183.

[12] *See* note 5, *supra*.

claims by § 6511(a)—disregards the legislative plan for seeking the recovery of income taxes as well as its underlying policy considerations. *See J. O. Johnson, Inc.* v. *United States*, 201 Ct. Cl. 315, 321–23, 476 F. 2d 1337, 1340–41, *cert. denied*, 414 U.S. 857 (1973). No authority is cited by plaintiff for the proposition that Congress intended § 692(1) to constitute statutory authority for suits against the United States outside the scope of that provided in the Internal Revenue Code. We have no warrant to deviate from the general Code pattern providing for the recovery of taxes without some clear reason or indication of legislative intent that refund claims under § 692(1) should be accorded the special treatment demanded by plaintiff. The only case cited by plaintiff in support of her theory that refunds under § 692(1) are governed by the general 6-year statute of limitations is *Hoon Kwan Young* v. *United States*, 110 F. Supp. 237 (D.Hawaii 1953). That decision is not in point since it was expressly grounded on the doctrine of account stated, a doctrine which sounds in contract and thereby allows recovery under the general 6-year statute of limitations. *See Bonwit Teller & Co.* v. *United States*, 283 U.S. 258, 265 (1931).

Plaintiff next asserts that § 6511(a) cannot control here because that section is applicable only to taxes in respect of which the taxpayer is required to file a return, and that Colonel Hampton was not required to file a return for the 1963 and 1964 taxes since § 692(1) cancels his liability for those taxes. The first problem with this argument is its narrow and strict interpretation as to the scope of § 6511(a). In *Alexander Proudfoot Co.* v. *United States*, 197 Ct. Cl. 219, 454 F. 2d 1379 (1972), and again in *J. O. Johnson, Inc.* v. *United States*, *supra*, this court refused to accept a restricted interpretation of § 6511(a) which would limit its application to taxes for which a return is required. Those cases concerned the taxpayers' claims for the recovery of sums paid in satisfaction of an accumulated earnings tax. It was argued that since an accumulated earnings tax is not the type of tax which is reported on a return—because it is not self-assessing in nature—the period of limitation was inap-

plicable. In rejecting this argument the court in *Alexander Proudfoot* stated:

> * * * § 6511(a) was obviously intended to cover all taxes, whether or not a return is required, and its wording can easily carry that understanding since it expressly provides for the case where "no return was filed by the taxpayer." [197 Ct. Cl. at 225, n. 7, 454 F. 2d at 1382, n. 7; *accord*, *J. O. Johnson, Inc.*, *supra*, 201 Ct. Cl. at 320, 476 F. 2d at 1340.]

This conclusion was shown to be supported by congressional intent, as manifested in the general legislative scheme of § 6511(a) and related sections of the tax code. *See J. O. Johnson*, *supra*, 201 Ct. Cl. at 320–23, 476 F. 2d at 1340–41.

In any event, plaintiff is incorrect in her assertion that Colonel Hampton was not required to file income tax returns for the years 1963 and 1964. The terms of § 692, which cancel liability for the "tax imposed," do not relieve taxpayers of the obligation of filing tax returns otherwise required under § 6012 of the Code (26 U.S.C.). Not only was Colonel Hampton required to file tax returns for the years 1963 and 1964, but returns for those years were, in fact, timely filed.

III

Having decided that claims for a tax refund pursuant to § 692(1) are not invulnerable to the defense of limitations, we turn to the question whether the statute of limitations operates to bar the refund claims involved in the instant case. The pertinent terms of § 6511(a) require that a claim for refund of taxes be filed within 3 years from the filing of the tax return. As mentioned earlier, Colonel Hampton's tax returns for 1963 and 1964 were filed on April 15, 1964 and April 15, 1965, respectively. As to the recovery of the 1963 taxes, the period of limitations expired on April 15, 1967. Thus, the period of limitations elapsed prior to Colonel Hampton's assignment to Vietnam, and prior to his combat death. According to the Government's theory, the operation of the statute of limitations closed the door so that the recovery of the 1963 taxes was never possible. As to the recovery of the 1964 taxes, the 3-year period of limitations would normally have expired on April 15, 1968. However, Colonel Hampton

was assigned to active duty in Vietnam on November 3, 1967, and the Government maintains that the running of the statute of limitations was suspended during his service in that combat zone by virtue of § 7508 of the Code (26 U.S.C.). That section postpones the time for performing certain acts under the revenue laws—including the time for filing a claim for credit or refund of any tax—during the period of service in a combat zone, plus the period of continuous hospitalization outside the United States attributable to injury in a combat zone, plus the next 180 days thereafter. The Government asserts that when an individual dies in combat § 7508 was intended by Congress to apply and to provide his estate with relief from the statute of limitations. This view is supported by the House Report associated with the enactment of § 3804(f) of the 1939 Code, the statutory predecessor of § 7508. The House Report states:

> * * * In the case of an individual who dies while serving in a combat zone, or while hospitalized outside the States of the Union and the District of Columbia as a result of injury received in a combat zone, the next 180 days after his death would be disregarded under section 3804 in determining whether acts have been timely performed by his executor, administrator, or conservator. [H.R. Rep. No. 3200, 81st Cong., 2d Sess. 2.]

The Government points out that the period of limitations for filing a claim with respect to the 1964 taxes had approximately 5½ months to run at the time of Colonel Hampton's assignment to Vietnam. Thus, under the Government's analysis, the period of limitations was suspended by § 7508 during the period of the taxpayer's service in Vietnam (November 3, 1967 to March 6, 1968), plus 180 days thereafter (March 7, 1968 to September 2, 1968) and it expired 5½ months later, on or about February 15, 1969. The Government says that plaintiff's claim for refund of the 1964 taxes would have been timely if it had been filed on or before February 15, 1969.

Plaintiff forcefully urges that the Government's analysis of the relationship between § 6511(a) and § 692(1) produces a result which is harsh, unreasonable and patently absurd. The crux of plaintiff's argument is that § 6511(a) assumes

that a claim for a tax refund arises upon the due date for filing the return (or alternatively, upon the date of actual payment), and that when its terms are applied to limit the period for the enforcement of a claim under § 692(1), which contemplates the date of the serviceman's death as the event giving rise to the claim for a tax refund, then an unintended injustice manifestly results. Plaintiff points out that the operation of these sections results in the expiration of the period of limitations—at least with respect to the refund claim for the 1963 taxes—prior to the time the claim under § 692(1) arises. Numerous authorities are relied upon for the proposition that a period limited by law for the enforcement of a claim cannot begin to run until such time as the claim or cause of action to which it relates arises. Plaintiff also invokes the principle that statutes must be construed to avoid absurd and whimsical results. It is submitted that refund claims for 1963 and 1964, having been filed within 3 years from the date of Colonel Hampton's death, were timely filed and not barred by the operation of § 6511(a).

The Government is technically correct in its conclusion that plaintiff's refund claims under § 692(1) are barred by the operation of § 6511(a) limitations. We do not hesitate to so hold. We would be inclined to agree with plaintiff's argument that the joint construction of § 692(1) and the statute of limitations produces an anomolous result if, in fact, plaintiff were correct in her contention that the death of Colonel Hampton gave rise to a claim for the refund of his 1963 and 1964 taxes. The principal flaw in plaintiff's reasoning is that it begs the ultimate question by assuming that the recovery of Colonel Hampton's 1963 and 1964 taxes is warranted under the provisions of § 692(1). We have concluded that the terms of § 692(1) do not authorize the refund of taxes for those years. When the relief accorded by § 692(1) is confined to its intended and limited scope, the interrelationship between that section of the Code and the statute of limitation produces no harsh, unjust or absurd results.

Section 692(1) expressly provides that any tax shall not apply with respect to the taxable year of a serviceman's death, "* * * or with respect to any prior taxable year end-

ing on or after the first day he so served in a combat zone after June 24, 1950 * * *." The extent of the relief provided is circumscribed by two events: one is the date of first service in a combat zone after June 24, 1950; the other is combat death. Drawing from the literal import of the language, plaintiff maintains that tax liability is cancelled for all years between these two events, whether or not their occurrence is in the same combat zone, and whether or not there are intervening years of noncombat service. This interpretation would allow recovery of the taxes for 1963 and 1964, 2 years of noncombat service in the span of time between Colonel Hampton's tour of combat duty in Korea and his tour of combat duty in Vietnam.

We interpret the statute differently. It is our view that Congress intended paragraph (1) of § 692 to cancel tax liability for *years of actual, continuous combat service* from the time a serviceman first entered the combat zone until his subsequent death therein. Since paragraph (1) relates solely to years in combat service, then paragraph (2)—which refers to "* * * taxable years preceding those specified in paragraph (1) * * *"—must accordingly relate to all years prior to the date in which a serviceman entered combat.

Section 692(1) and (2) should be construed together with the other related provisions of the Code which afford special tax treatment to members of the Armed Forces serving in combat. A brief description of the statutory framework will facilitate our analysis of the intended scope of relief under § 692(1), and it will demonstrate that the interpretation we have given to that section is in harmony with the legislative scheme. Under § 112 of the Code an exclusion from gross income is provided for pay received for active service by a member of the armed forces for any month during which he either served in a combat zone or was hospitalized as a result of wounds, disease, or injury incurred while serving in a combat zone. This is referred to as "combat pay." (In the case of enlisted personnel the exclusion applies to all of their pay; in the case of commissioned officers, the exclusion applies to the first $500 per month of their pay.) Additionally, under § 3401(a)(1) of the Code, such combat pay is not subject to withholding.

A serviceman in combat is also given an automatic extension of time to perform certain acts under the revenue laws by virtue of § 7508 of the Code. He may disregard the period of service in a combat zone plus any period of hospitalization abroad as a result of injuries incurred in such service, plus the next 180 days. The postponement authorized under § 7508 generally applies to the filing of returns, the payment of any tax, the assessment of any tax, and the commencement of any suit. As mentioned earlier, these deferment rules expressly authorize relief from the period of limitations for filing a claim for credit or refund of any tax. 26 U.S.C. § 7508(a)(1)(E). Moreover, in the case of an individual who dies while serving in a combat zone, or while hospitalized abroad as a result of injury received in a combat zone, the next 180 days after his death would be disregarded under § 7508 in determining whether acts have been timely performed by his executor, administrator or conservator.

The total legislative scheme of § 692 and these other related provisions is geared to accommodate the extigencies of war. The terms of paragraph (1) of § 692 clearly appear to contemplate that a serviceman's pay has not been included in gross income, that his combat pay was not subject to withholding, that the serviceman did not file any tax return, and that he did not in fact pay any taxes. Thus, the language of paragraph (1)—that "any tax under this subtitle *shall not apply* * * *" [emphasis added]—was not inadvertently chosen; it was obviously intended to be applicable with respect to years for which there was no obligation to file any returns or pay any tax. Since the tax "shall not apply" the estate of the deceased serviceman is thus relieved under paragraph (1) of the obligation of paying taxes for the years of combat service. By comparison, the language of paragraph (2) of § 692 provides that "*any tax* * * * *which is unpaid at the date of his death* (*including interest, additions to the tax, and additional amounts*) *shall not be assessed* * * *." [Emphasis added.] These terms assume that the serviceman has an outstanding tax liability which remains unpaid at the date of his death. Since there is no outstanding tax liability for the years of continuous service in a combat zone from the date of first entry until subsequent death therein, paragraph

(2) must refer solely to years prior to such combat service. The tax forgiveness of paragraph (2) frees the estate and family of the dead serviceman of the burden of raising funds to satisfy the serviceman's unpaid tax debts.

There are no "refund" provisions included in paragraph (1) (as there are in paragraph (2)), and this is further evidence that paragraph (1) applies strictly to years in combat service. The reason for the omission is, once again, that it was generally assumed that a serviceman in combat would not file returns and pay any tax during combat service; rather, it is was assumed that he would take advantage of the deferment rules of § 7508. It is clear, nevertheless, that if a serviceman was overly diligent and paid his taxes during years in combat, his estate could recover those taxes pursuant to paragraph (1) by filing a claim for the refund of an overpayment (*see* discussion, *supra*).

There is no harshness or absurdity resulting from the joint operation of § 692 (as we have construed its provisions) and the § 6511(a) statute of limitations. Under § 6511(a) the filing of a return (or the payment of a tax) normally commences the running of the period of limitations for refund claims. However, § 7508(a)(1)(E) defers the running of limitations as to refund claims during the period that a serviceman is in combat service, and for the next 180 days. Accordingly, 180 days after combat death the statute of limitations commences to run and the deceased serviceman's estate has 3 years from that time to file a claim for the refund of taxes paid during years of combat service.

There is nothing in the legislative history of § 692(1) to suggest that Congress intended it to provide tax relief for years of noncombat service which intervene two tours of combat duty in different combat zones. On the contrary, such indications as there are show that relief was to be limited to years of actual combat service from the date of first entry into a combat zone until subsequent death therein. The World War II measure for the abatement of income taxes upon the death of a member of the armed services, § 421 of the 1939 Code,[13] applied in the case of an individual who died on or after December 7, 1941 and "* * * prior to the termination

[13] *See* note 7, *supra*.

of the present war * * *." When that provision was amended by the Act of August 5, 1947 (61 Stat. 778) to broaden its relief,[14] the new provision applied in the case of an individual who died "* * * on or after December 7, 1941 * * * and prior to January 1, 1948 * * *." The carefully circumscribed terms of both versions of § 421 of the 1939 Code make clear that they were meant to apply in the case of deaths occurring during service in World War II. Between 1948 and 1950 this country was not engaged in any war and, accordingly, there was no tax relief measures similar to § 692 then in force. The Korean war version, § 154 of the 1939 Code,[15] applied in the case of an individual who died in combat "* * * after June 24, 1950, and prior to January 1, 1954 * * *." United States and United Nations forces were still engaged in the Korean conflict on January 1, 1954, and, accordingly, by the Technical Changes Act of 1953 (67 Stat. 615) Congress extended the terms of the tax relief measure for another year by striking out "January 1, 1954" and inserting "January 1, 1955." The terms of § 154 were clearly drawn to apply only with respect to years of combat service in the Korean war.

When § 692 came into being at the time of the enactment of the Internal Revenue Code of 1954, the Korean conflict had not yet come to an end.[16] The terms of § 692 were written to apply to combat deaths after June 24, 1950. No expiration date was included within the terms of § 692, evidently either because there was uncertainty as to when hostilities in Korea would terminate, and Congress wanted to avoid technical amendments extending the terms of § 692 in the future, or, as is more likely the case, it was felt that the inclusion of a specific expiration date in the statute was somewhat superfluous since the terms of § 692 became operative and inoperative by Executive Order. There was no need to enact special legislation or to amend § 692 to provide relief to the estates of servicemen killed in Vietnam; the terms of the

[14] *See* note 8, *supra*.
[15] *See* note 9, *supra*.
[16] It was not until January 31, 1955, that Korea lost its "combat zone" status for the purposes of the relevant sections of the Internal Revenue Code. Exec. Order No. 10585, 3 C.F.R., 1954–1958 Comp., p. 235.

statute became operative upon the President's designation of Vietnam as a "combat zone." [17]

As previously mentioned, the recent amendment of § 692 by Public Law 93–597 holds open the period of limitations so that relief under that section would not be lost due to a determination that a serviceman had died at an earlier time but had been mistakenly classified as missing in action. Prior to the amendment taxes were forgiven only through the year of the serviceman's *actual* death; the amendment extends the forgiveness to cover the years a serviceman is in missing status following his actual death. It is important to note that the limitations period is held open as to refund claims "* * * for any taxable year ending on or after February 28, 1961 * * *." Thus, the estates of those missing in action in Vietnam (and later determined to have died at an earlier time) can only claim refunds under § 692 for years subsequent to the commencement of hostilities in Vietnam. This is persuasive support for the view that Congress did not intend the estates of those dying in Vietnam to recover income taxes, pursuant to § 692(1), for taxable years prior to years of service in that combat zone.

In summary, Congress enacted § 692 to alleviate some of the hardships borne by survivors of servicemen dying as a result of service in a combat zone. Under paragraph (1) of that provision tax liability is cancelled for years of actual, continuous combat service from the time a serviceman first entered the combat zone until his subsequent death therein. Under paragraph (2) any taxes for prior years which remain unpaid at the serviceman's death are forgiven. We are unable to construe § 692 as liberally as plaintiff would like. To allow plaintiff to recover taxes for years of noncombat service (1963 and 1964), prior to Colonel Hampton's combat zone assignment to Vietnam in 1967, would provide plaintiff with a windfall and would stretch the relief afforded by § 692 beyond its intended bounds.

For the reasons stated above, we hold that plaintiff's tax refund claims were technically barred by the statute of limitations. But even if plaintiff were able to cross the barrier

[17] The date designated for the commencement of combatant activities in Vietnam was January 1, 1964. Exec. Order No. 11216, 3 C.F.R., 1964–1965 Comp., p. 301.

of limitations, her claim for the refund of Colonel Hampton's 1963 and 1964 income taxes would have to be disallowed on the merits. Accordingly, the plaintiff's motion for summary judgment is denied and the defendant's cross-motion for summary judgment is granted. The petition is dismissed.

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514 F. 2d 1003

MONROE M. TAPPER AND ASSOCIATES v. THE UNITED STATES

[No. 329-70. Decided March 19, 1975. Plaintiff's motion for rehearing denied April 25, 1975.]

ON PLAINTIFF'S AMENDED MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S SUPPLEMENTAL CROSS-MOTION FOR SUMMARY JUDGMENT

Contracts; disputes; administrative findings; arbitrary and capricious action; abuse of discretion; substantial evidence; remand to Board for determination on merits of claim.—In *Monroe M. Tapper & Assocs. v. United States*, 198 Ct. Cl. 72, 458 F. 2d 66 (1972), this court found that the Postal Service Board of Contract Appeals, in holding plaintiff's notice of appeal from the contracting officer's final decision untimely and dismissing the appeal, had not given adequate consideration to the facts and circumstances which might, in the proper exercise of its discretion, authorize the Board to waive the contractual appeal period. The court suspended proceedings pending plaintiff's further pursuit of its administrative remedy through a possible discretionary waiver by the Board of the time limit. Following a hearing, the Board determined that "on the assumption that it has 'power, in proper circumstances, to waive or extend the appeal period specified in the usual disputes clause,'" no facts or circumstances were presented in the appeal warranting or permitting exercise of such assumed power. Thereafter, the trial judge, on the parties' cross-motions for summary judgment and on review of the Board's decision under Wunderlich Act criteria, concluded that the Board's refusal to waive the contractual time limit constituted action that was arbitrary and an abuse of discretion. The trial judge recommended that the motions be denied without prejudice and that the case be remanded to the Board with instructions for prompt determination on the merits of plaintiff's claim for additional compensation because of the requirement that gravel be used in backfilling trenches for utility lines. The trial judge's opinion sets forth (1) the record evidence of the dealings which defendant had directly with Granger, to whom plaintiff had subcontracted all construction work under this contract; (2) the lack of dealings with plaintiff Tapper concerning the dispute until

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receipt of the formal untimely notice of appeal; (3) the dealings during the crucial period whereby Granger was led to believe that he would receive a copy of the contracting officer's decision without undue delay; (4) defendant's understanding that Granger intended to take an appeal from any adverse decision respecting the dispute; (5) the facts concerning the mailing of the decision directly to Tapper who was out of town and whose secretary misfiled the same, so that it was not brought to Granger's attention until after the appeal period, although Granger had made numerous inquiries concerning the decision. Defendant filed exceptions to the opinion, and an en banc hearing was held. It is *held* (1) that the substantial evidence test applies to judicial review under the Wunderlich Act of administrative actions involving abuse of discretion in the administration of Government contracts; (2) that the Board's finding that there was not a course of direct dealing between the Government and Granger on the backfill issue was arbitrary and led the Board into its subsequent findings (a) that defendant's action was not such as ought to induce Granger to believe that defendant would give him prompt notice of the decision and (b) that the delay in filing the appeal was not the result of Granger's reliance on defendant's conduct, but was due to Granger's misplaced reliance on Tapper; (3) that in view of the undisputed record evidence, such arbitrary findings were contrary to the evidence and constituted an abuse of discretion; and (4) that the refusal of the Board to waive the contractual time limit constituted arbitrary action and was an abuse of discretion. The decision of the Board is reversed and the case is remanded to the Board pursuant to Pub. L. 92–415 with directions to render a final decision on the merits within 6 months.

Contracts; disputes; administrative decision; arbitrary or capricious action; abuse of discretion.

[1] In cases involving abuse of discretion in the administration of Government contracts, the substantial evidence test applies to judicial review under the Wunderlich Act of decisions of Boards of Contract Appeals.

United States ⇐ 73(15)

Contracts; disputes; administrative findings, arbitrary and capricious action; abuse of discretion; what constitutes.

[2] Where the undisputed evidence before the Board showed that all of defendant's important dealings relative to the gravel backfill dispute were with plaintiff's local subcontractor (G) as the real party in interest, and that defendant had no dealings with plaintiff himself concerning the dispute until the receipt of the formal untimely notice of appeal which plaintiff signed at the request of (G), and where the Board's finding that there was no course of direct dealing between defendant and (G) on said dispute was the false premise which led the Board to find that defendant's

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action was not such as ought to have induced (G) to believe that defendant would give him prompt notice of the contracting officer's decision which was sent to plaintiff himself, the findings were arbitrary and constituted abuse of discretion.

United States ⇐ 73(15)

Contracts; disputes; administrative finding; arbitrary and capricious action; judicial review.

[3] An administrative finding in a Government contract dispute without substantial evidence to support it—an arbitrary or capricious finding—does violence to the law. It is without the sanction of the authority conferred, and an inquiry into the facts before the administrative board, in order to ascertain whether its findings are thus vitiated, belongs to the judicial province and does not trench upon, or involve the exercise of, administrative authority. Such an examination is not concerned with the weight of evidence or with the wisdom or expediency of the administrative action. (*Federal Radio Comm'n* v. *Nelson Bros. Bond & Mort. Co.*, 289 U.S. 266, 277 (1933).)

United States ⇐ 73(15)

Contracts; disputes; administrative findings; arbitrary and capricious action; abuse of discretion; what constitutes.

[4] The Board's findings regarding defendant's dealings with (G) that led (G) to believe he would receive a copy of the contracting officer's decision are arbitrary and capricious and therefore an abuse of discretion because the Board ignored (1) testimony of defendant's representative that he ordered his secretary to mail a copy of the decision to the architect-engineer at the same time it was transmitted to plaintiff, so that the decision would be immediately available to (G); (2) the testimony that defendant failed to send the decision to plaintiff by certified mail as required by Federal Procurement Regulation § 1–1.318–1(b); (3) the guidelines set forth by this court prior to remand of the case for Board determination.

United States ⇐ 73(15)

Contracts; remand to administrative board; administrative remedies, availability of.

[5] Although over a period of years, (G) acting for plaintiff, endeavored unsuccessfully to obtain a final administrative decision on the merits of the backfill claim and was twice thwarted by the Board in its determination that the appeal from the contracting officer's decision was untimely and by defendant's arbitrary action on remand in refusing to waive the contractual 30-day time limit, such circumstances are insufficient to justify the presumption that the Board upon further remand would delay action unduly or act arbitrarily on the merits of the claim. Accordingly, it is appropriate pursuant to Pub. L. 92–415 to remand the case to the Board with directions to conduct such further de novo hearings as may be

Opinion of the Court

necessary to decide, on the merits, whether plaintiff is entitled to additional compensation on its claim and to render a prompt final decision.

United States ⇐ 73(15)

F. Trowbridge vom Baur, attorney of record, for plaintiff. *Michael J. Rubin*, with whom was *Assistant Attorney General Carla A. Hills*, for defendant.

Before COWEN, *Chief Judge*, DAVIS, SKELTON, NICHOLS, KASHIWA, KUNZIG, and BENNETT, *Judges*.

COWEN, *Chief Judge*, delivered the opinion of the court:

We are called upon to decide another issue arising in connection with plaintiff's long-continued and persistent efforts to obtain a decision on the merits by the Postal Service Board of Contract Appeals on plaintiff's appeal from an adverse decision of the contracting officer. After the Board had dismissed plaintiff's appeal as untimely, we held that the Board had not given adequate consideration to the facts and circumstances which might, in the proper exercise of its discretion, authorize it to waive the contractual period for an appeal from the contracting officer's decision. Accordingly, we suspended proceedings pending plaintiff's further pursuit of its administrative remedy through a possible discretionary waiver by the Board of the contractual time limit. *Monroe M. Tapper & Associates* v. *United States*, 198 Ct. Cl. 72, 458 F. 2d 66 (1972). After holding a hearing, the Board issued its decision on remand in which it determined that "on the assumption that it has 'power, in proper circumstances, to waive or extend the appeal period specified in the usual disputes clauses,' no facts or circumstances have been presented in this appeal which would warrant or permit the exercise of such assumed power." PSBCA No. 349, 72–2 BCA ¶9629.

Thereafter, the case came before Trial Judge Mastin G. White on the parties' cross-motions for summary judgment, and these motions required a Wunderlich Act review of the Board's decision. The trial judge concluded that the refusal of the Board to waive the contractual 30-day time limit con-

stituted action that was arbitrary and an abuse of discretion. He recommended that the parties' cross-motions for summary judgment be denied without prejudice, and that the case be remanded to the Board with instructions for a prompt determination on the merits of the contractor's claim for additional compensation because of the requirement that gravel be used in backfilling trenches for utility lines. The case is before us now on defendant's exceptions to the trial judge's opinion. After an en banc hearing and after considering the arguments and briefs of the parties, we find that the trial judge's determinations based on his review of the administrative record are correct, and we adopt his conclusion of law and his recommendation for remand of the case.

I

At oral argument there was an indication that there is some confusion by counsel as to the standard that should be used by this court in its review of the latest Board decision. However, any confusion on that point should be dispelled by reference to our decision in *Moore-McCormack Lines, Inc.* v. *United States*, 188 Ct. Cl. 644, 413 F. 2d 568 (1969). We there held that in cases involving abuse of discretion in the administration of Government contracts, the standards provided in the Wunderlich Act, 41 U.S.C. §§ 321–322 (1964) apply. In that case, which also dealt with questions of procedure, the court stated that "questions of abuse of discretion are subsumed under the review required (41 U.S.C. § 321) for arbitrariness or capriciousness." 188 Ct. Cl. at 669, 413 F. 2d at 583. This is not a situation in which the scope of judicial review is limited by a statute which precludes judicial review, or by one which is drawn in such broad terms that there is no law to apply. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 410 (1971).[1] *See also* Berger, *Administrative Arbitrariness and Judicial Review*, 65 Col. L. Rev. 55 (1965).

[1] The Supreme Court also held that under the provisions of the Administrative Procedure Act, the substantial evidence test applies to judicial review of an agency action which is based on a public adjudicatory hearing. Such a hearing was held in this case, and we likewise apply the substantial evidence test.

II

Under the contract that is involved in the present case, the plaintiff, Monroe M. Tapper and Associates (Tapper), agreed to construct a Post Office and Vehicle Maintenance Facility in Worcester, Massachusetts, according to plans and specifications prepared by the Post Office Department (now the Postal Service), and to lease the completed structure to the Department for a specified term. Tapper was a Minneapolis, Minnesota, real estate developer and investor, and not a builder, and was principally interested in the contract for investment purposes. Consequently, Tapper engaged a general contractor in Worcester, Granger Contracting Co., Inc. (Granger), to do the entire job of construction for a lump-sum price of $4,830,000.

The Worcester architectural firm of C. W. Buckley, Inc. (Buckley), was engaged by the Post Office Department as Architect-Engineer to supervise the construction. During performance of the contract, Buckley and Granger had offices in the same building.

Stephen M. Trich (Trich), an official of the Post Office Department in Washington, D.C., customarily represented the Department in handling matters that reached the departmental level in connection with the construction, although a Deputy Assistant Postmaster General was technically the contracting officer. Trich was the Chief of Building Construction in the Bureau of Research and Engineering. He testified that he visited the construction site once a month for the construction progress meeting and that, prior to the meeting, he always went in to see Dragon, Granger's Vice President in charge of engineering, to see whether there was anything he wished to bring out at the meeting; that if Granger was in (two doors away) he would say "hello" to him.

The contract contained the usual "disputes" provision, which gave the "lessor" (Tapper) a 30-day period within which to appeal in writing to the Postmaster General from a final decision rendered by the contracting officer on a dispute arising under the contract.

Tapper took very little interest in the construction process, other than to make a few phone calls to Trich and to sign papers occasionally, as the prime contractor, when requested to do so by Granger and assured by Granger that the papers were in proper order. Postal officials were aware that Granger was the real party in interest concerning construction matters arising in connection with the job, and it was Granger who dealt with these officials on such matters, usually through Buckley. Tapper attended a preconstruction meeting in Worcester on August 8, 1968, with Granger, Trich, and others, where it was agreed that Granger would obtain Post Office Department approval of a project manager, and it was understood by Tapper that change orders over $2,000 should go through Tapper's office. Tapper wrote a letter to Granger on August 19, 1968, authorizing Granger to approve and execute change orders in the amount of $2,000 or less "in my behalf." The letter also stated: "Should change orders be larger than $2,000, the authority for such execution shall be mine."

During the course of the construction, a controversy arose in September 1968 between Granger and Buckley over whether, as contended by Buckley and denied by Granger, the contract specifications required that gravel be used in backfilling trenches for utility lines. The contracting officer's adverse ruling on this dispute was the subject of plaintiff's appeal to the Board.

III

In our decision of April 14, 1972, 198 Ct. Cl. 72, 458 F. 2d 66 (1972), remanding the case to the Board, the court stated that the plaintiff should be permitted to apply to the Board for a further consideration of a discretionary waiver, because the course of defendant's dealings with Granger as the real party in interest may have induced him to believe that he would promptly receive a copy of the contracting officer's final decision and, thus, set in motion a timely appeal. In determining that there was no basis to warrant the exercise of a waiver of the contractual time limit for plaintiff's appeal to the Board, the Board found "there simply is no evidence of a course of direct dealing by respondent [the Government]

with Granger in regard to the subject of the backfill material." Plaintiff has characterized this finding as astounding, arbitrary, capricious, and unsupported by substantial evidence. Indeed it is. Our able trial judge, who has had extensive experience in reviewing administrative records in contract cases, found that

> [T]he undisputed evidence before the board showed that all dealings by the Post Office Department relative to the backfill dispute during the crucial period were with Granger, either directly or through Buckley, [defendant's Architect-Engineer], and that the Department did not have any dealings with Tapper concerning that subject up until the receipt on February 26, 1969, of the formal appeal which Tapper signed at the request of Granger.

Moreover, the Board's finding is in direct conflict with the finding which this court made in its decision of April 14, 1972, on the basis of the administrative record of the first Board hearing held on March 17, 1970.[2] The Board's conclusion is also contrary to its own evidentiary findings on the same question.

A review of the evidence shows that from the very beginning of the construction, the Government dealt directly with Granger as the real party in interest on all matters relating to construction, and particularly on disputes arising between Granger and C. W. Buckley, Inc. [Buckley], the Architect-Engineer whom the Government employed to represent it at the site. Tapper was involved in none of these matters. As he stated in his testimony, "after receiving the award and entering into the contract with the Granger Construction Company to build it, the extent of my concern was paying the bills and making periodic calls to Mr. Trich to see how things were going."

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[2] Among other things, the court found:

"Tapper left almost all of the dealings with the Government, with respect to construction, to Granger—see note 1, *supra*—and the communication between Granger and the defendant (including Buckley, the architect-engineer) was extensive, continuous, and routine. In particular, on the backfill dispute (here involved) the relations were wholly between Granger and the Government, without any participation by or notification to Tapper up to Granger's request for a final decision by the contracting officer." 198 Ct. Cl. at 78, 458 F. 2d at 69.

At the beginning of the contract work, Trich requested Granger, not Tapper, to select a project manager and to submit a statement of his qualifications to the Government. Tapper had nothing whatever to do with the selection of the project manager, and no copy of Granger's letter submitting its selection of the project manager was sent to him. Even the Board recognized that this was, of course, a direct dealing between defendant and Granger; it could not do otherwise in the face of the evidence. The Board correctly concluded that this incident, standing alone, was not sufficient to show a course of direct dealing with Granger. However, the Board then chose to ignore all other evidence regarding the Government's direct dealings with Granger on the issue before us.

The uncontroverted evidence shows that the Government's order to use gravel backfill for certain utility trenches was not transmitted to Tapper but was given directly to Granger by Buckley. This was direct dealing, for it cannot be denied that Buckley was the Government's representative at the site.

Thereafter on September 23, 1968, there was a three-way telephone conversation among Granger's vice president and Buckley at Worcester and a representative of the Post Office Department in the Specifications Department in Washington, D.C. In this conversation, Granger's representative, Mr. Dragon, was told that Granger would not receive reimbursement for the gravel used in the earth fill. This, too, was direct dealing with Granger to the complete exclusion of Tapper. The denial was confirmed in a letter dated September 26, 1968, from Mr. Sandlin of the Post Office Department to Buckley. On September 30, 1968, Buckley promptly forwarded a copy of the letter to Granger. In addition, a facsimile of this letter was mailed directly by the Post Office Department to Granger and received by Granger on October 2, 1968.

No copy of either letter was sent by the Post Office Department to Tapper. These letters constitute indisputable documentary evidence of direct dealings between the Post Office Department and Granger to the exclusion of Tapper on the issue here in dispute.

On October 23, 1968, Granger wrote directly to the Post Office Department, requesting a review of Mr. Sandlin's determination and a final decision on the matter.

On November 1, 1968, Mr. Trich returned his copy of the letter with a request that Granger's letter be sent through proper channels (the Architect-Engineer) so that the latter could review and comment on the contents of Granger's request.

At a construction progress meeting held at the site on November 14, 1968, Granger and Buckley made inquiry regarding "proper channels" for handling the dispute on the backfill, and the minutes of the meeting show that the following advice was given:

> On questions of dispute, the final decision is rendered by the Contracting Officer. A request should be submitted from the Contractor [Granger], through the Architect [Buckley], to the P.O.D. Items over $2,000 should be submitted from the Lessor [Tapper] to the Architect to the P.O.D. In the case of a negative decision from the Contracting Officer, the Lessor may appeal the decision. Emergency decisions may be given over the phone from the P.O.D. if the Architect is not available. Respondent's Ex. 1.

On November 14, 1968, immediately following the meeting, Granger, through its vice president, Mr. Dragon, expressed Granger's disagreement with Sandlin's decision in a letter to Buckley and sent by him to the Post Office Department. The letter stated in part:

> We would therefore request that you review *our* request and advise us of your final decision * * * * We request your final decision in the matter as soon as possible *so that we may take further action if necessary.* [Emphasis supplied]

The Government then clearly waived the requirements stated in the conference of November 14, 1968, by accepting and acting on this request from Granger as a basis for the contracting officer's decision dated December 23, 1968. We regard this action as irrefutable proof of direct dealing by the Government with Granger. This final decision by the contracting officer on the dispute was made solely in response to Granger's written request, quoted above, and without any

consultation or communication whatever between the officials of the Post Office Department and Tapper.

The same pattern of direct dealing by the Government with Granger was followed in other disputes, including changes involving more than $2,000, as well as those involving less. In each instance when Granger felt that he was entitled to additional compensation on changes and related matters, the request therefor was submitted first to Buckley, the Architect-Engineer, and was thereafter reviewed by Mr. Trich. If the Government agreed with Granger, a written change order would be signed and sent to Tapper for signature; he would sign it after Granger telephoned him to do so. If there was no agreement, the Post Office Department sent Mr. Trich or Mr. Simpson to the site of the work to negotiate directly with Granger about the price. If these negotiations resulted in an agreement, the Post Office Department would prepare a change order, sign it, mail it to Tapper for signature, and he, in turn, would sign after being advised by telephone to do so by Granger. Up to the point of signing the change orders, Tapper had nothing whatever to do with the negotiations. An illustration of the practice regularly followed was the change involving the embankment at the rear of the Post Office which was accomplished at an increased cost of approximately $15,000; the amount paid Granger was finally negotiated between Granger and Simpson in February 1970. The same thing occurred with the box lobby change involving extra costs of about $14,000; the amount of the additional compensation paid to Granger was finally negotiated between Granger and Simpson.

We emphasize the importance of the Board's arbitrary finding that there was no course of direct dealing between the Government and Granger on the backfill issue. In our opinion, this finding was the false premise which led the Board into making two additional arbitrary findings. The first of these was its conclusion that the Government's action prior to January 9, 1969, was not such as ought to induce Granger to believe that the Government would give him prompt notice of the contracting officer's decision that was sent to Tapper. The second was that delay in filing the appeal was not the result of Granger's reliance on the Gov-

ernment's conduct, but was due to Granger's misplaced reliance on Tapper's conduct, first, in not advising Granger of the receipt of the final decision, and, subsequently, in denying he had received it.

In our decision remanding the case to the Board, the court provided the following guidelines for the Board to follow in determining whether defendant's dealings with Granger reasonably led Granger to believe that it would receive a copy of the final decision in time to make a timely appeal:

> * * * Moreover, even if discretion was exercised, it is clear that the Board focused solely on the conduct and responsibilities of Tapper, not considering Granger's interests or position at all. Although Tapper, as the prime, is the proper and necessary plaintiff and the named contractor, Granger is obviously the real party in interest, except in the formal and technical sense. When purely legal rights are being appraised, such as the timeliness of the appeal, the defendant can rightly insist that the notice had to be filed in Tapper's name and the time began to run when Tapper received the contracting officer's decision. But when the equitable concept of discretion-to-waive is invoked, all the pertinent circumstances must be evaluated, including Granger's role vis-a-vis the Government and the Government's conduct toward and dealings with Granger. 198 Ct. Cl. at 80, 458 F. 2d at 70–71.

The Board largely ignored these guidelines and simply closed its eyes to evidence showing that in the main, it was the Government's conduct in its relations with Granger that reasonably led Granger to believe that it would receive a copy of the decision in time to file an appeal in Tapper's name. Since the Board's decision disregarded both the court's guidelines and practically all of the evidence adverse to the Government, we hold that the two findings mentioned above were also arbitrary and constituted an abuse of discretion.

Beginning shortly after Granger submitted the request for a final decision (under date of November 14, 1968), Granger repeatedly made inquiries of both Buckley and Trich as to what action the Government had taken.

Mr. Trich stated that the decision would be coming from someone higher up, but he assured Granger that a copy would

be sent to Buckley as soon as it was issued and that Granger could get a copy of it from Buckley.

The importance of these assurances by Mr. Trich lies in the fact that he prepared the contracting officer's final decision in its entirety, although it was formally signed by the contracting officer. In this, as in all other matters relating to the dispute, Mr. Trich was the "Government" for all realistic and practical purposes in the administration of the contract.

We know now that the contracting officer's decision on the backfill issue was originally typed December 5, 1968, (Mr. Trich's draft) and retyped on December 23, 1968. It bears a date stamp of December 23, 1968. However, we do not know when it was actually mailed or received by Tapper's office. The Board found that Tapper's office received it on or before January 16, 1969.

We think there is no doubt that Mr. Trich assured Granger that a copy of the decision would be sent promptly to Buckley and that Granger would get a copy of it from Buckley. The Board has omitted any reference (and presumably gave no consideration) to Mr. Trich's testimony that he directed his secretary—the same secretary who prepared the envelope for mailing the decision to Tapper—to send a copy at the same time to Buckley. There is no explanation in the record why this was not done, but it is highly probable that if Mr. Trich's instructions had been carried out, Granger would have received a copy of the decision in adequate time to perfect the appeal.

It is undisputed that Tapper's office force consisted of one secretary; that he was on vacation in Arizona at the time the letter was received, and that it was erroneously filed by her in the "Equal Opportunity" file. Prior to leaving on vacation, Tapper had been receiving numerous routine letters from the Complaints Office of the Equal Opportunity Commission and had paid scant attention to them.

There was nothing about the letter containing the decision dated December 23, 1968, which would have attracted the attention of Tapper's secretary to the fact that this was something other than routine correspondence. The fact that the letter was mislaid by her was due, to a considerable extent,

to the Government's failure to comply with Federal Procurement Regulation § 1–1.318–1(b), which states:

> A copy of each contracting officer's decision shall be furnished to the contractor by certified mail, return receipt requested, or by any other method which provides evidence of the date of receipt of the decision of the contractor.

Mr. Trich, himself, admitted that the decision should have been sent by certified mail.

The Board relied heavily on the January 9, 1969, meeting, at which time Mr. Trich told Granger's representative that the contracting officer had rendered an adverse decision and that a copy had been mailed to Tapper. Since the letter had not been sent by certified mail as required by the regulations, Mr. Trich was unable to say whether or when Tapper received it. However, Trich again promised that a copy would be sent to Buckley. At that time, Mr. Trich was informed by Granger's representative that Granger intended to appeal the decision. In order to prepare the appeal, he needed and was entitled to a complete written copy of the decision—the copy that Mr. Trich had several times promised to send to Buckley where Granger could obtain it.

As it developed, the assurances of Mr. Trich, although doubtlessly made in good faith, proved to be unreliable. Buckley did not receive anything resembling a final decision until February 3, 1969, some six weeks after the December 23, 1968, decision date. Although this document resembled a "final decision," it was unsigned and had blank spaces for the concurrences of a number of people in the Department. These features made it reasonably seem to be merely a draft of a later-to-be released final decision. Confused by this correspondence and by Tapper's denial of any receipt of a final decision, Granger discussed the matter with Mr. Trich on February 5, 1969, at the regular monthly construction meeting. It was at this conference that Mr. Trich accomplished the final act that lulled Granger into inaction. Because of the Post Office Department's failure to transmit Tapper's copy of the final decision by certified mail, return receipt requested, Mr. Trich did not know and therefore could not say whether Tapper had actually received a copy of the final

decision. However, Mr. Trich did state that if Tapper had received the decision, the 30-day appeal period had already expired. At the same time, he said that if Tapper had not received the decision, the 30-day period for the appeal would run from February 3, 1969, the day Granger received the copy from Buckley. The indefinite advice then given Granger by Mr. Trich, plus the confusing nature of the draft copy, certainly lulled Granger into inaction until February 25, 1969.

Applying the standards we have adopted for review of the Board's decision, we hold that the Board's decision on the "direct dealing" issue was contrary to practically all the evidence in the record and in conflict with the court's findings on the same question. Such an arbitrary determination constitutes an abuse of discretion and should be set aside. Berger, *Administrative Arbitrariness and Judicial Review*, 65 Col. L. Rev. 55, 58–59 (1965). Long ago in *Federal Radio Comm'n* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 277 (1933), the Supreme Court declared:

> A finding without substantial evidence to support it—an arbitrary or capricious finding—does violence to the law. It is without the sanction of the authority conferred. And an inquiry into the facts before the Commission, in order to ascertain whether its findings are thus vitiated, belongs to the judicial province and does not trench upon, or involve the exercise of, administrative authority. Such an examination is not concerned with the weight of evidence or with the wisdom or expediency of the administrative action.

In *ICC* v. *Louisville & Nashville R.R.*, 227 U.S. 88 (1913), the Government attempted to convince the Supreme Court that a decision of the Interstate Commerce Commission was conclusive and "could not be set aside, even if the holding was wholly without substantial evidence to support it." The Court's disagreement with this argument was stated as follows:

> But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. *A finding without evidence is arbitrary and baseless.* And if the Government's

contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our Government. It would mean that where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another; is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power. [Emphasis supplied] 227 U.S. at 91.

The Board's findings on the other crucial issues in the case—those relating to the defendant's dealings with Granger that led him to believe that he would receive a copy of the contracting officer's decision in time to appeal—are also arbitrary. These findings are arbitrary, because the Board ignored important evidence, particularly the testimony of Mr. Trich, and largely disregarded the guidelines set forth in the court's decision of remand. The Board's failure or refusal to consider such evidence was arbitrary and capricious. *Hemby* v. *United States*, 185 Ct. Cl. 140, 150 (1968). On this phase of the case, the following language of the Supreme Court in *Morgan* v. *United States*, 298 U.S. 468, 480 (1936), seems particularly appropriate:

> There must be a full hearing. There must be evidence adequate to support pertinent and necessary findings of fact. * * * *Facts and circumstances which ought to be considered must not be excluded.* [Emphasis supplied]

Since we have concluded that the refusal of the Board to waive the contractual 30-day time limit in this instance constituted arbitrary action and was an abuse of discretion, the decision of the Board is reversed and the case remanded as provided in Part IV hereof.

IV

At oral argument plaintiff contended, as it had before the trial judge, that since its administrative remedy has been proven to be both inadequate and unavailable, plaintiff is entitled to a de novo court trial on the breach of contract claim, and further that plaintiff should thereafter be permitted to sue in this court for damages resulting from de-

fendant's breach of its contractual obligation to provide an adequate, available, and reasonable administrative remedy. The trial judge's decision on this phase of the case was as follows:

> It is necessary to determine in the present case, therefore, whether the administrative remedy has been shown to be inadequate with respect to the backfill claim. It has been noted previously in this opinion that, over a period of years, Granger (acting through Tapper) endeavored unsuccessfully to obtain a final administrative decision on the merits of the backfill claim. This attempt failed in the first instance because of the 1970 decision by the Post Office Board of Contract Appeals that the appeal from the contracting officer's decision was untimely, and it was thwarted again by the arbitrary 1972 action of the Postal Service Board of Contract Appeals in refusing to waive the contractual 30-day time limit with respect to this appeal. It has been argued, with considerable persuasiveness, that the administrative remedy has therefore proved to be inadequate. On the other hand, the circumstances just recited are deemed insufficient to justify the presumption that the Postal Service Board of Contract Appeals, upon a remand, would delay action unduly or act arbitrarily on the merits of the backfill claim. *Cf. United States* v. *Anthony Grace & Sons, Inc., supra*, 384 U.S. at 430.

Plaintiff took no exception to any part of the trial judge's decision, and we adopt his determination as the basis for our decision. Accordingly, it is ordered that the parties' cross-motions for summary judgment are denied without prejudice and the case is hereby remanded to the Postal Service Board of Contract Appeals pursuant to Pub. L. 92–415, 86 Stat. 652 and Rule 149(b) for a period not to exceed six months from this date. The Board is directed to conduct such further de novo hearings as may be necessary to decide, on the merits, whether the contractor is entitled to additional compensation—and if so, the amount of such compensation—because of the requirement that gravel be used in backfilling trenches for utility lines; and to render a prompt final administrative decision on the question. Further proceedings in the court shall be stayed during the period fixed in this order of remand. Plaintiff's attorney of record is designated

to advise the court, by letter to the trial judge, of the status of the remand proceedings, and such advice shall be given at intervals of 90 days or less, commencing with the date of this decision.

SKELTON, *Judge*, dissenting:

My disagreement with the majority opinion can best be understood perhaps by considering our different approaches to the problem before us and the difference in our views as to the present posture of the case. After a great deal of reflection and study, I have concluded that the majority opinion is in error in requiring the discretionary decision of the Board to be supported by substantial evidence.

We held in *Maney Aircraft Parts, Inc.* v. *United States*, 197 Ct. Cl. 159, 453 F. 2d 1260 (1972); *Maney Aircraft Parts, Inc.* v. *United States*, 202 Ct. Cl. 54, 479 F. 2d 1350 (1973); *Moran Bros., Inc.*, v. *United States*, 171 Ct. Cl. 245, 346 F. 2d 590 (1965); *Schlesinger* v. *United States*, 181 Ct. Cl. 21, 383 F. 2d 1004 (1967); and *Monroe M. Tapper & Assocs.* v. *United States*, 198 Ct. Cl. 72, 458 F. 2d 66 (1972) that the Board may in the exercise of its discretion waive the 30 day time limit for a contractor to appeal to the Board from a decision of a contracting officer.

However, in the instant case the majority opinion seems to ignore the discretion vested in the Board by this court in the above cited decisions, and now establishes a different requirement to the effect that the Board's decision must be supported by substantial evidence. In my opinion, the terms "exercise of discretion" and "supported by substantial evidence" are contradictory if *required* to exist at the same time. While it is true that as a matter of fact a discretionary decision of the Board may be supported by substantial evidence in a given case by happenstance, on the other hand it may not be. If the decision is required to be supported by substantial evidence, as the majority opinion holds, there is no discretion left to the Board. It appears that the majority opinion in this case takes away the discretion that we held in the above cited cases was vested in the Board.

The word "discretion" is defined in Webster's Third New International Dictionary as follows:

> At will; according to one's judgment or pleasure; the latitude of decision within which a court or judge decides questions arising in a particular case not expressly controlled by fixed rules of law according to the circumstances and according to the judgment of the court or judge (as in suspension of a sentence or the amount of a fine).

The same dictionary defines the word "discretionary" as follows:

> Left to discretion or individual judgment; exercised at one's own discretion.

Roget's International Thesaurus, Third Edition, gives the following as synonyms to the word "discretion."

> Option, will, at will, free will, choice, free decision, volition, own volition, as one thinks best, and as it seems good or best.

It is clear that the holding of the majority that the Board's discretionary decision must be supported by substantial evidence is contrary to the plain meaning of the words "discretion" and "discretionary." As shown above by the quotation from the dictionary, a decision of a judge suspending a sentence or a fine in a criminal case is a discretionary act on his part. It would be unthinkable to say that his decision must be supported by substantial evidence. Our case is no different. Both situations involve decisions that are equitable in nature. We so held as to a Board's decision in a situation like the one presently before us in *Maney Aircraft Parts, Inc.* v. *United States*, *supra*, where we said:

> * * * The decision of the Board on this problem *is essentially equitable rather than legal*, with an objective to do justice under the circumstances. * * * [Emphasis supplied.] [202 Ct. Cl. at 60, 479 F. 2d at 1353.]

The majority opinion recognizes that the Board's decision is equitable in nature by saying that the instant case was remanded to the Board so that it might exercise its *discretion* as to whether or not a waiver should be granted, and quoting from our remand decision:

> * * * But when the *equitable* concept of discretion-to-waive is invoked, all the pertinent circumstances must

be evaluated, * * *. [Emphasis supplied.] [198 Ct. Cl. at 80, 458 F. 2d at 71.]

Yet the majority opinion imposes on the Board the *legal* test of substantial evidence in order for the Board to reach an *equity* decision.

The majority opinion is apparently based on the assumption that the claim of plaintiff that he is entitled to a waiver as to his late filing of his appeal is a claim that arose *under* the contract. This is shown by the reliance of the majority on the case of *Moore-McCormack Lines, Inc.* v. *United States*, 188 Ct. Cl. 644, 413 F. 2d 568 (1969) which involved a suit by shipowners to force the Maritime Board to reveal the procedures it had used in arriving at the amount of ship subsidies the shipowners were entitled to *under* their contracts with the Government. We there held that the plaintiffs were entitled to this information *under* their contracts and that by reason thereof the standards of the Wunderlich Act (41 U.S.C. §§ 321–22 (1964)) applied. This is shown by the following statement from the opinion in that case.

> Once a contract has been made, though, the case is entirely different. Both parties have commitments which restrict their freedom of action. Each has surrendered valuable consideration, and is legally entitled to his *quid pro quo*. At this point, the Wunderlich Act, 41 U.S.C. §§ 321–22 (1964), enters to guarantee at least a minimal measure of judicial review of administrative determinations *under* "*any* contract entered into by the United States" (emphasis added). The express requirement that "a question of law" be open for court examination under every federal agreement (41 U.S.C. § 322) covers most, if not all, major issues of procedure, and, of course, questions of abuse of discretion are subsumed under the review required (41 U.S.C. § 321) for arbitrariness or capriciousness. The court has held that operating-differential subsidy agreements are to be treated, especially with respect to abuse of discretion, *like other government contracts* (*Pacific Far East Line, Inc.* v. *United States*, 184 Ct. Cl. 169, 184, 394 F. 2d 990, 998 (1968)), and there is no reason for a different handling of construction-differential subsidy contracts. At a minimum, the Board is therefore responsible to the courts for legal errors and abuse of discretion— at least for procedural deficiencies. [Emphasis supplied.] [Footnote omitted.] [*Id.* at 669, 413 F. 2d at 583.]

The situation in that case was completely different to that in the instant case. There the plaintiffs were suing to enforce rights to subsidies they had under their contracts. Here the contract of the plaintiff has no provision whatever with reference to a waiver for late filing of an appeal. In fact, it is not even mentioned in the contract. Since the claim for waiver did not arise *under* the contract, the Wunderlich standards do not apply, and the reliance of the majority on the case of *Moore-McCormack Lines, Inc.* v. *United States, supra*, is misplaced.

If the majority opinion holds that the plaintiff's waiver claim arose *under* his contract and is redressable under it, which appears to be the case, we would have to dismiss his case for failure to exhaust his administrative remedies. This is so because the only way his claim for waiver could arise under his contract would be through the disputes clause in the contract. That clause provides very specifically that:

> * * * [A]ny dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the contracting officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless [the Contractor appeals within 30 days].

It is undisputed that the plaintiff did not present any request to the contracting officer for an extension or enlargement of time for the filing of his appeal, nor any request for a waiver of the 30 day time limit for filing an appeal, and, of course, the contracting officer never rendered an opinion on any of such matters. Consequently, if plaintiff's claim for a waiver of the appeal time limit arose under the disputes clause, he failed to exhaust his administrative remedies. Plaintiff's counsel was no doubt aware of this fact when he stated very emphatically in his oral argument that the plaintiff's claim before the court *did not arise under the disputes clause.*

The majority opinion cites *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971) in support of its substantial evidence test. In my opinion, that case is authority against the plaintiff on this point, as well as on others,

instead of in his favor. There the Secretary of Transportation in the exercise of discretion, designated a highway through a public park and authorized federal funds for that purpose. The plaintiffs sued to set aside his decision on the grounds that his action was not authorized under the Department of Transporation Act of 1966 (49 U.S.C. § 1653) and the Federal-Aid Highway Act of 1968 (23 U.S.C. § 138) if there was in existence a feasible and prudent alternate route. The question was whether or not the Secretary had abused his discretion in making his decision and issuing the order. The Court held that the substantial evidence standard did not apply, saying in connection with the contentions of the plaintiffs:

> * * * First, they contend that the "substantial evidence" standard of § 706(2)(E)[1] must be applied. In the alternative, they claim that § 706(2)(F)[2] applies and that there must be a *de novo* review to determine if the Secretary's action was "unwarranted by the facts." *Neither of these standards is, however, applicable.* [Emphasis supplied.] [401 U.S. at 414.]

The court not only rejected the substantial evidence test, but also adopted a "clear error of judgment" test, which is far less favorable to the plaintiff in the instant case than the substantial evidence test that the majority opinion advocates. In this connection the Supreme Court held:

> * * * Section 706(2)(A) requires a finding that the actual choice made was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (1964 ed., Supp. V). To make this finding the court must consider whether the decision was based on a consideration of the relevant factors *and whether there has been a clear error of judgment.* Jaffe, *supra*, at 182. See *McBee* v. *Bomar*, 296 F. 2d 235, 237 (CA6 1961); *In re Josephson*, 218 F. 2d 174, 182 (CA1 1954); *Western Addition Community Organization* v. *Weaver*, 294 F. Supp. 433 (ND Cal. 1968). See also *Wong Wing Hang* v. *Immigration and Naturalization Serv.*, 360 F. 2d 715, 719 (CA2 1966). Although this inquiry into the facts is to be searching and careful, *the ultimate standard of review is a narrow one. The court is*

[1] 5 U.S.C. § 706(2)(E)
[2] 5 U.S.C. § 706(2)(F)

not empowered to substitute its judgment for that of the agency. [Emphasis supplied.] [401 U.S. at 416.]

The Court also said:

> Even though there is no *de novo* review in this case case and the Secretary's approval of the route of I–40 *does not have ultimately to meet the substantial-evidence test*, * * * . [Emphasis supplied.] [401 U.S. at 415.]

In that case the court did state that in certain narrow and specifically limited situations (not present here), the substantial evidence standard could be used. The Court said:

> * * * In certain *narrow*, *specifically limited situations*, the agency action is to be set aside if the action was not supported by "substantial evidence." * * * 5 U.S.C. §§ 706(2)(E), (F) (1964 ed., Supp. V).
>
> * * * * *
>
> Review under the substantial-evidence test is authorized *only* when the agency action is taken pursuant to a rulemaking provision of the Administrative Procedure Act itself, 5 U.S.C. § 553 (1964 ed., Supp. V), or when the agency action is based on a public adjudicatory hearing. See 5 U.S.C. §§ 556, 557 (1964 ed., Supp. V). * * * [Emphasis supplied.] [401 U.S. at 414.]

The majority opinion in the instant case says that a public adjudicatory hearing was held by the Board. I do not agree. There was no public hearing by the Board. In speaking of a public adjudicatory hearing, the Supreme Court had in mind the public hearings described in sections 556 and 557 of the Administrative Procedure Act (5 U.S.C. §§ 556–57) which deal with full-fledged hearings on the *merits and hearings provided by statute*. Neither type of hearing was had in the instant case, nor in *Citizens to Preserve Overton Park, Inc.*, *supra*, where the Supreme Court refused to use the substantial evidence standard in reviewing the Secretary's discretionary decision.

The decision of the Court in *Bell Lines, Inc.* v. *United States*, 306 F. Supp. 209 (S.D. W. Va. 1969) *aff'd per curiam*, 397 U.S. 818 (1970) appears to be very much in point. In that case suit was filed to set aside an order of the Interstate Commerce Commission granting temporary authority to certain motor freight lines to expand their services in eastern United States. The Congress vested authority in the Com-

mission by 49 U.S.C. § 310a. to grant, *in its discretion*, such temporary authority for carrier service. The court held that it had authority to review the action of the Commission by reason of the provisions of the Administrative Procedure Act, saying:

> * * * Section 706 [of the Act] defines scope of review including review of agency action which is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." * * * [*Id.* at 212.]

The court held further that the substantial evidence rule did not apply, saying:

> To recapitulate, the Court restates its disposition of the questions presented, as follows:
>
> 1. The Court has jurisdiction to review the orders of the Interstate Commerce Commission granting temporary authority to motor carriers under 49 U.S.C.A. Section 310a.
>
> 2. The scope of judicial review is limited, under the state of the record here, to a determination of whether the Commission's orders are arbitrary or capricious, in abuse of discretion or for some other reasons contrary to law.
>
> 3. The "*substantial evidence*" *rule*, applicable in the judicial review of many Commission orders relating to grants of certificates of convenience and necessity, *is not applicable* in grants of temporary authority to motor carriers under 49 U.S.C.A. Section 310a. [Emphasis supplied.] [*Id.* at 218.]

The court went on to hold that there was no abuse of discretion by the Commission in issuing the order. The decision was affirmed by the Supreme Court without opinion.

One may well ask how the standard for judicial review of a discretionary decision of an agency or board can be determined. The Supreme Court in the *Overton Park* case, *supra*, said that the answer lies in the Administrative Procedure Act (The Act). The Court said:

> * * * But the existence of judicial review is only the start: *the standard for the review must also be determined. For that we must look to § 706 of the Administrative Procedure Act, 5 U.S.C. § 706 (1964 ed., Supp. V)*, which provides that a "reviewing court shall * * *

hold unlawful and set aside agency action, findings, and conclusions found" not to meet six separate standards.[30] In all cases agency action must be set aside if the action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or if the action failed to meet statutory, procedural, or constitutional requirements. 5 U.S.C. §§ 706(2)(A), (B), (C), (D) (1964 ed., Supp. V). * * *

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[30] To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
"(1) compel agency action unlawfully withheld or unreasonably delayed; and
"(2) hold unlawful and set aside agency action, findings, and conclusions found to be—
"(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
"(B) contrary to constitutional right, power, privilege, or immunity;
"(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
"(D) without observance of procedure required by law;
"(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
"(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. * * *" [Emphasis supplied.] [401 U.S. at 413–14.]

The applicable portions of the above quoted Act in the instant case are sections (2) and (2)(A). They provide that a reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. In my opinion, this is the standard or test that should be used in the instant case in reviewing the Board's discretionary decision. We quoted the pertinent parts of the above Act in our decision in *Moore-McCormack Lines, Inc.*, *supra*, and, although not spelled out in so many words, we indicated, at least by inference, that the standard set forth in the above Act should be used by a reviewing court if the claim of the plaintiff did not arise *under* a contract. *See also Jones* v. *Freeman*, 400 F. 2d 383 (8th Cir. 1968); *Scanwell Laboratories, Inc.* v. *Shaffer*, 424 F. 2d 859 (D.C. Cir. 1970); and *Bell Lines, Inc.* v. *United States*, *supra*.

Having established the proper test or standard we are required to apply in reviewing the discretionary decision of the Board as prescribed by the Act, I will now consider whether or not the Board's decision is arbitrary, capricious, or an abuse of discretion.

Dissenting Opinion by Judge Skelton

We held in *Maney Aircraft Parts, Inc.* v. *United States*, 202 Ct. Cl. 54, 479 F. 2d 1350 (1973) in remanding that case to the Board to exercise its discretion as to whether or not it should grant the plaintiff a waiver of the 30-day time limit for its appeal (which was the same situation as exists here) we said:

> * * * In exercising its discretion, the Board should consider all facts and circumstances, including the conduct of both the contractor and the government and arrive at a decision that it considers fair, just, and equitable to both parties. [*Id.* at 61, 479 F. 2d at 1354.]

In the instant case, the findings of the Board show that it followed the above procedure and considered all the facts and circumstances, including all of the detailed facts in the majority opinion as well as those discussed below, many of which overlap with those set forth in the majority opinion, and arrived at a decision in the exercise of its discretion that it considered fair, just, and equitable to both parties.

The majority opinion discusses the facts in great detail. This is not a trial *de novo*, but a review of the discretionary decision of the Board. In this posture of the case we are not a fact finding body. That function is reserved to the Board. However, it may be helpful to comment on the procedure used by the Board after our remand of the case, and on the pertinent facts mentioned by the Board in its decision.

From an examination of the "Decision" of September 7, 1972, I am satisfied that the Board considered the relevant evidence, including, as directed by the court, "Granger's role vis-a-vis the Government and the Government's conduct toward and dealings with Granger." With the court's direction obviously in mind, the Board held a prehearing conference at which the issue to be tried was defined to the satisfaction of both parties.[3] It then conducted a further hearing with a view to considering "all evidence—particularly evidence not previously offered—relating to the pertinent circumstances involved."

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[3] It was: "Are there any circumstances, including the matter of whether Granger was not itself lulled into inaction by the Government's failure to send it a copy of the final decision, which would warrant the Board's entertaining this appeal on its merits?"

The decision first reviews the Government-Granger relationship in the pre-construction phase, after the contract had been awarded Tapper and after Tapper had engaged Granger to perform the construction work. It notes Granger's testimony that one of the things that established a course of conduct of direct dealing between him and the Government was that on August 14, 1968, he wrote directly to Trich concerning the appointment of F. A. Nilson as Granger's project manager and that Sandlin wrote, on August 21, 1968, directly to Granger approving Nilson's appointment. It points out, however, that at the pre-construction meeting held in Worcester on August 8, 1968, at which Tapper himself, Granger, Trich and others were present, it was agreed that Granger would obtain Post Office Department approval of a project manager.

The decision recites the history of the backfill dispute: the telephone call of September 23, 1968, to the Post Office Department made by the Architect-Engineer at Granger's request; the oral answer that reimbursement would be denied; the letter of September 26, 1968, from the Post Office Department to the Architect-Engineer confirming the oral denial of reimbursement, a copy of which Granger received from the Architect-Engineer on October 1, 1968; Granger's receipt on October 2, 1968, directly from the Post Office Department, of what amounted to a copy of its letter of September 26 to the Architect-Engineer; Granger's letter of October 23, 1968, directly to the Post Office Department, showing courtesy copies to Tapper and the Architect-Engineer and requesting a final decision; the return of this letter to Granger with a one-sentence letter by Trich to submit the request "to proper channels"; the November 14, 1968, construction conference at which oral instructions were given Granger's representative about the proper handling of disputes, including:

> Items over $2.000 should be submitted from the Lessor [Tapper] to the Architect to the P.O.D. In the case of a negative decision, the Lessor may appeal the decision,

the fact that on the same day (November 14, 1968) Granger wrote about the backfill matter to the Architect-Engineer, the letter showing a courtesy copy to Tapper (which he received) and requesting a final decision; and the transmittal by the

Dissenting Opinion by Judge Skelton

Architect-Engineer of Granger's letter to the Post Office Department on November 19, 1968. Statements concerning the foregoing communications and minutes of the November 14 conference are accompanied by references to the record and exhibits. Referring to the above recitation, the Board said: "There simply is no evidence of a *course* of *direct* dealing by Respondent with Granger in regard to the subject of the backfill material." [Emphasis supplied.] Inasmuch as any "course of dealing," particularly of a formal nature (i.e. "the paperwork"), could be said to have been *indirect*, namely: from Granger to the Architect-Engineer to the Post Office Department, or from the Department to the Architect-Engineer to Granger, the Board's statement can hardly be regarded as erroneous.[4]

Next the decision considers the matter of whether Granger was lulled into inaction by the Government's [Post Office Department's] delay in sending Granger a copy of the final decision.[5] It points to the conflict between the parties over whether Granger's representative was told by Trich on January 9, 1969, the date of the January construction progress meeting, that the Contracting Officer's final decision had been mailed to Tapper and that it was unfavorable, namely: Trich's recollection that Granger's representative was so advised at that time vs. Granger's claim that it was not until sometime near February 3, 1969, that Trich told him of the

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[4] R. J. Lamoureux, who was employed by the Architect-Engineer as Project Architect throughout the period of the dispute, testified: "We were the intermediary between Granger and Tapper and the Post Office."

[5] The decision also considers Granger's belief that *he* had thirty days from the date on which *he* received the *copy* of the decision within which to give the necessary notice of intent to appeal, describing Granger's testimony in support of this belief, and then setting forth the reasons why he knew or should have known that the thirty-day appeal period began to run as of the date of receipt by Tapper of the Contracting Officer's final decision (e.g. the fact that reference was made to the disputes clause in Granger's letters of October 23 and November 14, 1968, requesting a final decision; advice he received at the November 14, 1968, construction conference; and his knowledge that Tapper had to sign the appeal papers). It concludes that there is no adequate foundation for plaintiff's assertion that the Government was "inexcusably careless" and "neglectful" because it had sent the final decision only to Tapper. Such a conclusion is reasonable, and I also note that the contract between Tapper and Granger provides that, in event of a dispute covered by the "disputes clause" of the Post Office Department General Conditions, Granger, within the time permitted will through Owner [Tapper], and in Owner's name, pursue the procedure for disputes provided in such clause * * *."

issuance of the adverse decision. The Board accepts Trich's recollection "as the more reliable," because: (1) Trich had the monthly construction progress meeting to serve as a guide; and (2) Granger testified that about halfway through the period between the time the final decision was requested (November 14, 1968) and the date of his receipt of a copy of the final decision (February 3, 1969), Trich told him that the decision (which was dated December 23, 1968) had been mailed to Tapper and that the Architect-Engineer would get a copy of it; so that "by Granger's own statement he learned of the final decision at, or very shortly after, the time of its issuance." The Board also said:

> The fact that on February 3 Granger had in its possession a copy of the decision letter showing that it had been signed, and the additional fact that Granger had been advised of the decision by Trich on January 9, were more than adequate to have alerted Granger that on February 3 the appeal period was nearing its close.

In its earlier opinion, this court noted that Granger's explanation for the delay in filing an appeal was two fold: (1) his confusion resulting from the nature of the copy of the final decision [showing two dates—date typed and date stamped, with blank spaces for six concurrences], and his question of whether an official letter had ever been sent; and (2) Tapper's insistence that he had not received any final decision. In response, the Board states that the copy of the decision letter should not have confused Granger since the markings were of the same character as the copy of the letter Granger received on October 2, 1968; further, that the delay in filing the appeal notice was not a result of reliance on respondent's conduct, but, rather, of Granger's misplaced reliance on Tapper's conduct, first in not advising Granger of the decision letter, and subsequently in denying he had received it. At the hearing preceding the Board's last decision, Granger himself testified as follows with respect to his first call to Tapper about receipt of the decision:

> Q. And you telephoned Mr. Tapper?
> A. That's right.
> Q. And presumably, if Mr. Tapper had said yes, I've received it, you would have said file an appeal, is that correct?

A. I would have sent through the language for Mr. Tapper to file the appeal, yes, immediately.
Q. You knew the appeal had to come from Mr. Tapper, then didn't you?
A. I knew that he had to sign the papers but we were going to prepare the language.

Thus, it is apparent that even if Granger had relied on receiving a copy of the final decision promptly after it was mailed to Tapper, he would "immediately" have sent the language for Tapper to file the appeal if, at the time of his first call to Tapper "in late January 1969," he had been correctly informed by Tapper that the final decision had been received. On the basis that Granger seasonably asked Tapper (first after Trich told him in January that the final decision had been issued, and again on February 4, 1969) whether he had received the decision, it should be concluded that the Board's finding that Tapper's negative answers occasioned the failure to file the appeal by February 15, 1969, the deadline, was reasonably based on fact.[6]

When the appeal was finally filed, it was filed by Tapper, the prime contractor, and not by Granger, the subcontractor. This fact shows conclusively that Tapper and Granger both knew all the time that any appeal had to be made by Tapper.

We are not empowered to substitute our judgment on the facts for that of the Board. The Supreme Court made that perfectly clear in *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, *supra*, when it said:

> * * * The court is not empowered to substitute its judgment for that of the agency. [401 U.S. at 416.]

Nevertheless, the detailed treatment of the facts in the majority opinion, together with the decision of the majority overturning the decision of the Board on the facts, make it

[6] Plaintiff's argument that failure of the Post Office Department to send the final decision by certified mail pursuant to Federal Procurement Regulation § 1-1.318-1(b) was responsible for improper filing in Tapper's office, without it being called to his attention, is pure speculation as there is no evidence to that effect. Moreover, this regulation is designed merely to facilitate proof by the Government of actual receipt, which is moot here since the Board found when Tapper received the decision and Tapper has not challenged this finding. Moreover, the regulation was for the benefit of the Government and not the contractor. It could not possibly make the Government responsible for the way Tapper ran his office nor for his negligence in this case.

appear that the majority is substituting its opinion on the facts for that of the Board. I think this is error. It is true that there are facts in the case that are favorable to the plaintiff, but on the other hand, there are facts favorable to the Government. If these facts were before us in the first instance, there could be room for disagreement and we might reach a result different from that of the Board. But this is not the case. The Board has considered all the facts pro and con, and, in the exercise of its discretion, has decided in effect that the plaintiff has failed to show good cause or a justifiable excuse for failing to file his appeal on time as required by us in *Maney Aircraft Parts, Inc.* v. *United States*, 202 Ct. Cl. 54, 479 F. 2d 1350 (1973), and for that reason refused to grant the waiver of late filing.[7] The plaintiff has not shown that the decision of the Board is arbitrary, capricious, or an abuse of discretion. In my opinion, the majority opinion is in error in holding to the contrary.

This is the first case where a discretionary decision of a Board not to grant a waiver of the 30-day time limit for an appeal by a contractor has been overturned by this court. The precedent established by the majority opinion should be a matter of grave concern to both contractors and the Government alike with respect to future contracts.

It should be pointed out that, although there is no privity of contract between the Government and the subcontractor Granger, the majority opinion holds that because of dealings between the contracting officer and the subcontractor, the real party in interest is the subcontractor. Because of these dealings, the majority ignores the provisions of the contract between Tapper, the prime contractor, and the Government, and nullifies the 30-day time period for appeal by the contractor in the contract, and, in effect, rewrites the contract so as to give the contractor Tapper extra time to file his appeal (how much extra time is not indicated). The decision of the majority that the subcontractor is the real party in interest and by reason of dealings between him and the contracting

[7] On remand in the *Maney* case, the Board found in exercising its discretion that the plaintiff had not shown good cause nor a justifiable excuse for failing to file its appeal within the 30-day time limit, and we approved the decision of the Board by order entered on the 16th day of January, 1975.

officer the provision in the contract between the prime contractor and the Government limiting the appeal period for the contractor to 30 days is in effect nullified, is a very serious matter. It could well be very harmful to contractors as well as to the Government in the performance and administration of future contracts. This is true because in the performance of most contracts, especially those involving construction, the work on the job is done by subcontractors. These subcontractors have, in many cases, daily contacts with the contracting officers for the purposes of seeking advice, holding conferences, and obtaining interpretation of plans and various types of assistance. The full cooperation of the contracting officers is vital. In the future, because of the decision here, contractors may find that contracting officers will be reluctant to have dealings with subcontractors for fear that in case of a dispute, a court, as in the instant case, may hold that the subcontractors are the real parties in interest, notwithstanding the fact that there is no privity of contract between them and the Government. Such lack of cooperation could cause all kinds of problems and hamper, and perhaps delay, the performance of the contracts, and this would be detrimental to the Government.

Furthermore, the 30-day time limit for appeals in the disputes clause could well be rendered meaningless and unenforceable, as it has been in this case. Copies of decisions of contracting officers may have to be sent to all subcontractors to guard against the possibility that otherwise they might be held to be the real parties in interest, which could require a waiver of the 30-day time limit for an appeal, as in the instant case.

It seems to me by reason of the foregoing, that the majority opinion goes much further than merely holding that the Board abused its discretion in failing to find that the plaintiff has not shown good cause or a justifiable excuse for the late filing of his petition.

For all of the foregoing reasons, I would hold that the plaintiff has failed to show that the Board's discretionary decision not to waive the 30-day time limit for plaintiff's appeal was arbitrary, capricious, or an abuse of discretion and I would affirm the decision of the Board, deny plaintiff's mo-

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tion for summary judgment, and grant defendant's cross-motion for summary judgment and dismiss plaintiff's petition.

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512 F. 2d 1073

INLAND CONTAINER, INC. v. THE UNITED STATES

[No. 350–70. Decided March 19, 1975]

ON THE PROOFS

Contracts; breach; requirements contract; failure to terminate; late deliveries; waiver; damages.—Plaintiff, whose principal place of business is at Ontario, California, seeks damages for alleged breach by the Defense Supply Depot at Ogden, Utah, of three consecutive, annual contracts with plaintiff for the Depot's requirements of fiberboard shipping boxes. The first contract obligated Depot to order from plaintiff all of its box requirements "that may in the judgment of the contracting officer be required during the contract term"; the second and third contracts provided that "the Government shall order from the Contractor all the [boxes] which are required to be purchased by the [Depot]." Plaintiff and other box manufacturers were solicited by Depot officers, including the contracting officer, to locate a branch plant near the Depot; in November 1969 and after third contract award plaintiff therefore established a plant near the Depot, at Clearfield, Utah. The plant closed in March 1970 because of losses. The alleged breach resides in the practice of Depot, throughout the three contracts, and unbeknownst to plaintiff until after it established its new plant, of ordering boxes Depot needed from General Services Administration (GSA) before placing an order with plaintiff pursuant to the contract in force. GSA, operating under requirements contracts with box manufacturers other than plaintiff, regularly stocked most of the types of boxes on plaintiff's contract schedules, ordered boxes through computerized forecasts in advance of Depot's needs, and promptly furnished the items whenever Depot called for them. Thus, plaintiff got the leavings, which included special boxes not stocked by GSA. Defendant denies liability, contending that the procurement of boxes from GSA did not breach its contractual obligation because boxes available on the shelves of GSA are not "purchased" when obtained by requisition, to fill a specific Depot order. It is *held* (1) that "required to be purchased" and "required" include the boxes ordered from GSA and purchased by it to meet Depot's requirements; (2) that "requisitioned" in the context here includes "purchased"; (3) that three internal regulations of

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the Defense Supply Agency relied upon by defendant as justifying its practice have not been shown to be applicable to this case; they are addressed to "local purchases" as an exception to "centralized procurement" of "GSA-Managed Items"; there is no proof that boxes were such items, so procured, and that Depot's purchases were "local purchases." Similarly an ASPR provision relied upon has not been shown to be applicable; the term "local purchase" could hardly include the formal and substantial procurement which took place in this case; (4) that the defense that plaintiff delayed in deliveries is unavailing. Since defendant did not terminate the contracts for default, it cannot now raise the delay to excuse its own breach; (5) that the breach is compensable as a termination for convenience and thus that plaintiff is not entitled to lost profits; (6) that plaintiff is entitled to recover as the costs and expenses payable on a termination the operating loss suffered upon closing of the Clearfield plant; and (7) that the amount of the first year operating loss at Clearfield is a "fair and reasonable approximation" of the damage. Judgment is entered for plaintiff and against defendant for $34,831.72.

Contracts; interpretation; requirements contract; "required to be purchased."

[1] Where a requirements contract provided that "the Government shall order from the Contractor all the [boxes] which are required to be purchased by the [Government contracting agency]," the words "required to be purchased" and "required" in the context of the present situation included boxes needed and requisitioned by the contracting agency from the supply maintained and purchased systematically and continually from other box manufacturers by General Services Administration to meet the agency's requirements. The effect was the same as if the agency itself was purchasing in advance of requirements, to meet its requirements.

United States ⇐ 70(9)

Contracts; interpretation; "requisition."

[2] The fact that the paper ordering the subject boxes was called a "requisition" is immaterial. "Requisition" is an administrative name for the paper transfer from an agent-purchaser (General Services Administration) to a principal-user (the contracting agency) of boxes which had already been purchased by GSA. The whole system was designed to bring about the purchase of required boxes, and the using agency paid a price which included all the elements of a purchase, including, presumably, the costs of GSA.

United States ⇐ 70(9)

Federal Register; documents required to be published; notice.

[3] Publication of federal regulations, including Armed Services Procurement Regulations, in the Federal Register is notice of their

contents and provisions thereof are binding and have the force of law.

United States ⇐ 28
Records ⇐ 19

Evidence; weight and sufficiency of evidence; self-serving testimony.

[4] Where, in support of the charge that plaintiff's record of deliveries of boxes, once an order was placed, was poor in contrast to orders placed with General Services Administration's centralized procurement facility, the contracting officer proferred testimony that the contracting agency's war-related mission was such that it could not have tolerated plaintiff's delivery record on all the boxes needed, such testimony must be rejected as unconvincing since it was self-serving, given by one who was not particularly expert and was uncorroborated by contemporary documents or communications of such a view to plaintiff at the time.

United States ⇐ 74(11)

Contracts; delivery; delay in delivery; delivery time, waiver of.

[5] Although plaintiff frequently failed to meet contract delivery-time requirements for boxes, where defendant did not terminate the contract and complained of delays only to the extent of issuing three cure notices and plaintiff cured the default in the time allowed, defendant cannot now raise plaintiff's delay as a retroactive default to excuse defendant's own breach of the requirements contract.

United States ⇐ 73(22)

Contracts; damages; measure of damages; profits, loss of anticipated profits.

[6] Though the subject contracts were breached without reference to or reliance upon the contracts' termination-for-convenience clause, the clause nevertheless restricts damages recoverable for the breach to those which would have been allowable under said clause had it been invoked.

United States ⇐ 74(13)

Contracts; termination; partial termination; continued performance by contractor.

[7] Where the Government placed orders for boxes with General Services Administration's centralized procurement facility rather than with plaintiff as required by the contract, such actions constituted in effect notification to plaintiff of a partial termination to the extent of each order so placed, but such hypothetical partial termination would not have required plaintiff to abandon performance. Reasonable commercial judgment required that plaintiff continue performance.

United States ⇐ 72(11)

Contracts; damages; measure of damages; operating loss re newly constructed plant.

[8] Where plaintiff established a manufacturing plant at the urging

of defendant, solely in preparation for defendant's orders and on the strength of the award of the third annual contract, but closed it in less than 6 months for lack of Government orders in breach of contract, plaintiff's operating loss is a fair approximation of the "initial costs and preparatory expense" within the meaning of the convenience-termination clause of the contract. Use of the amount of the plant's operating loss as a measure of initial costs and preparatory expense is a reasonable method for computing damages, particularly where the preparatory expenses were not costs of preliminary work on a single job in an existing and continuing plant, but the losses suffered when the whole plant was established to perform one piece of work and closed with a loss when the work was not forthcoming.

United States ⇐ 74(13)

Contracts; damages; jury verdict.

[9] In the absence of a more reliable method of determining damages for breach of contract because of inability to compute the damages precisely, the amount of the verdict in a bench trial, whether comprising "initial costs and preparatory expenses" within the meaning of the convenience-termination clause or more traditional elements of damages, may, therefore, be as unarticulated—as approximate or, even, as subjective—as a verdict by a jury.

United States ⇐ 74(13)

Edward M. Garrett, attorney of record, for plaintiff. *Hanson & Garrett*, of counsel.

Gerald L. Schrader, with whom was *Assistant Attorney General Carla A. Hills*, for defendant.

Before DAVIS, KASHIWA, and BENNETT, *Judges*.

PER CURIAM: This case comes before the court on exceptions by the parties to the recommended decision filed March 4, 1974, by Trial Judge David Schwartz, pursuant to Rule 134(h), having been submitted to the court on the briefs and oral argument of counsel. Upon consideration thereof, since the court agrees with the trial judge's recommended decision, as hereinafter set forth, it hereby affirms and adopts the same as the basis for its judgment in this case. Therefore, it is concluded that plaintiff is entitled to recover and judgment is entered for plaintiff and against defendant in the sum of $34,831.72.

OPINION OF TRIAL JUDGE

SCHWARTZ, *Trial Judge:* This is an action for $92,570 as damages for breach by the Defense Depot at Ogden, Utah, of three contracts with plaintiff for the Depot's requirements of fiberboard shipping boxes. The claim is here found valid. Damages, held assessable under the convenience-termination clauses in the contracts, are found to be proven under the third contract only, in the amount of $34,831.72.

The Defense Depot, a facility of the Defense Supply Agency, Department of Defense, stocks and, as needed, packs and ships electronic equipment, clothing and other supplies to military installations throughout the world, primarily, at the times involved, to installations in Southeast Asia. Plaintiff is a manufacturer of corrugated fiberboard boxes, with its principal place of business in Ontario, California. Beginning in 1967 the Depot awarded to plaintiff three consecutive, annual contracts for boxes. The first contract covered only Schedules VI and VII of the invitation, the second contract only Schedule VII. In the third contract, which extended from September 1969 to September 1970, plaintiff was awarded Schedules III through VI, a substantial portion of the total invitation and a significant increase over the previous contracts.

The contracts were what is known as requirements-type contracts. The first contract obligated the Depot "to order from the contractor all of its requirements" of the designated boxes "that may in the judgement [sic] of the contracting officer be required during the contract term." [1] The second and third contracts provided that "the Government shall

[1] The first, 1967–68, contract provided:
"THIS IS A REQUIREMENT TYPE CONTRACT FOR FIBERBOARD BOXES. THE CONTRACTOR WILL BE REQUIRED TO FURNISH THE SUPPLIES ORDERED DURING THE LIFE OF THE CONTRACT IN THE QUANTITIES ORDERED WITHIN THE LIMITATIONS SPECIFIED HEREIN. THE GOVERNMENT WILL BE OBLIGATED TO ORDER FROM THE CONTRACTOR ALL OF ITS REQUIREMENTS OF THE ITEMS PROVIDED HEREUNDER THAT MAY IN THE JUDGEMENT [sic] OF THE CONTRACTING OFFICER BE REQUIRED DURING THE CONTRACT TERM."

order from the Contractor all the * * * [boxes] which are required to be purchased by the" Depot.[2]

Prior to the award to the third contract, Depot officers, including the contracting officer—the Depot's procurement officer for boxes—had solicited plaintiff, and other box manufacturers, to locate a branch plant near the Depot. The officers did this in the interest of promoting competition and facilitating Government orders of boxes. Plaintiff was willing, if it could get enough business from the Depot to warrant a branch plant. Accordingly, on receipt of the substantial award of the third contract, plaintiff established a second plant at Clearfield, Utah, not far from the Depot in Ogden, with the expectation that the Depot's business would carry the plant for a year and the hope that meanwhile other business would be developed.

The alleged breach resides in the practice of the Depot, throughout the three contracts, of ordering the boxes it needed from the General Services Administration, under a system to be described, before placing an order with plaintiff pursuant to the contract in force. The Depot's orders for plaintiff's boxes during the third contract amounted to $146,099; during the same period orders placed with GSA for the type of boxes covered by the contract amounted to $446,720.

The Depot–GSA relationship was unknown to plaintiff until well into the third contract, when plaintiff had already established the branch plant and saw that it was practically idle for insufficient orders. The branch plant, opened in mid-November 1969, did a gross business of $54,000, of which $35,000 was for boxes for the Depot, before it closed in March 1970, with a loss of $35,000.

It appears that GSA, and particularly GSA Denver, with which the Depot dealt, stocked not only boxes but other supplies as well for requisition by federal agencies. Specifically, GSA regularly stocked most of the boxes on the

[2] The second and third contracts, for 1968–69 and 1969–70, provided: "* * * the Government shall order from the Contractor all the supplies * * * which are required to be purchased by the Government activity identified in the 'Ordering' clause."

schedules of the contracts with plaintiff. Operating under requirements contracts, with box manufacturers other than plaintiff, providing for 70-day delivery, GSA ordered boxes in advance of the Depot's needs, to meet those needs. The Depot paid GSA for the boxes; the payments went into a revolving fund which financed the system, and the price was fixed so that GSA would "break even" on the operation.

GSA and the Depot had a close working relationship involving forecasts of need by the Depot, periodically updated, a computerized system at GSA which would automatically reorder boxes when stocks fell below a pre-set level and the storage of boxes in GSA warehouses until the Depot called for them. Telephone orders were placed by the Depot for boxes needed urgently and deliveries or pick-ups could be arranged by telephone on GSA or Depot trucks. In consequence, GSA could deliver boxes to the Depot with great promptness, often on the same day, from stocks kept by GSA suppliers or warehouses as near to the Depot as Clearfield. If GSA Denver was unable to meet the Depot's needs from its own stocks, it would draw on other GSA warehouses, in Texas or elsewhere.

The net result was that GSA stocked or was able promptly to provide a ready supply of most of the kinds of boxes used by the Depot. Plaintiff got the leavings, including, prominently, all of the Depot's need for special boxes, called full-flap, difficult and time-consuming to make. Almost 35 percent of the boxes ordered from plaintiff under its third contract were these full-flap boxes. GSA did not stock these boxes.

The Depot was not without some doubts over its treatment of plaintiff, though, as will appear, its officers believed they were doing the correct thing under "regulations." The contracting officer testified that at about the time of the award of the third contract it occurred to him that in the light of the Depot's practice of ordering boxes from GSA, the requirements clauses in the outstanding contracts might be confusing or misunderstood. A clause was thereupon drafted, to be added to solicitations for such contracts, stating that "boxes available from Government Agencies *will not* be ordered under this contract" [emphasis in the original].

What the effect of such a clause might have been—whether it gives sufficient notice of the practice described here—need not be decided, for the clause was not added to any of the contracts now in suit. The episode is important as tending to show some awareness by the Depot that the contract words "required to be purchased" and "required," might (as is now held) be taken to include the boxes ordered from GSA and purchased by it to meet the Depot's requirements.

As a defense to the claim of breach, the Government says, first, that the boxes were not "purchased" (a word found only in the clause in the second and third contracts, see note 2, *supra*), but requisitioned. Except for this, there is apparently no contest of the basic proposition that the language used was clear enough to create an obligation to order from plaintiff all of the Depot's requirements of boxes to be purchased. *Goldwasser* v. *United States*, 163 Ct. Cl. 450, 325 F. 2d 722 (1963); *Locke* v. *United States*, 151 Ct. Cl. 262, 283 F. 2d 521 (1960).

The contention is that boxes available on the shelves of a sister agency, when obtained by requisition, are not "purchased." This may well be so in a simple case of the reimbursable requisition of boxes originally procured by the sister agency for its own needs. Here, however, boxes were being purchased systematically and continually, at the request of a using agency, to meet the needs of that agency. The effect was the same as if the Depot itself was purchasing in advance of requirements, to meet its requirements. The Depot was purchasing, by ordering from GSA, and GSA was, in these circumstances, the purchasing agent or arm of the Depot, engaged in regularly purchasing boxes on behalf of the Depot, to meet the Depot's requirements. Purchases, in the sense of the contract, could be said to have been made by either the Depot or GSA.

The Government emphasizes that no purchases were made to fill a specific Depot order. True, GSA made purchases only to replenish stocks and not, upon receipt of an order, to fill that order. But it makes little difference, for purposes of a contract for boxes "required to be purchased," that purchases are made in advance of the need, to provide stocks to meet needs when they arise, rather than after the need has become

immediate. The boxes were still required to be purchased, and were in fact purchased, by the Depot or by its purchasing agent to meet the principal's requirements.

That the ordering paper was called a "requisition" is also immaterial. A "requisition" is an administrative name, here, for the paper transfer from an agent-purchaser to a principal-user of boxes which had already been purchased. The whole system was designed to bring about the purchase of required boxes, and the using agency paid a price which included all the elements of a purchase, including, presumably, the costs of the buying agency.

A next defense is based on regulations of the Defense Supply Agency, internal to the Agency and not published in the Federal Register, and a provision in the Armed Services Procurement Regulations (ASPR), published, of course, in the Federal Register, and thus binding on the plaintiff and having the force of law. Depot personnel testified that regulations of their Agency known as DSAR 4140.39, DSAM 4140.2 and DSAM 5335.1 required them to order boxes from GSA as they did, despite the contract with plaintiff; they had not heard of the regulation in ASPR. The text of the Agency regulations, without their context, was introduced in evidence. The Government in its post-trial brief recognizes that the Defense Supply Agency regulations were internal to the Agency, that is, not officially printed in any way that would give plaintiff constructive notice of them. Reliance is put on the latter two of the internal regulations, which are said to have presumably issued in implementation of the ASPR provision, and on the ASPR provision, itself.

The definitions in DSAR 4140.39, of "DSA Manager," "DSA-managed Items" and "DSA Centrally Procured Items," describe a system for procurement by a "DSA Manager" of items of supply which are "DSA-Managed." None of the regulations list or describe DSA-Managed items. A "DSA-Managed" item is "managed by the DSA Manager normally for DoD as a whole." "DSA-Managed Items" may be procured by two methods. They are "either centrally procured by the DSA Manager or are decentralized to the using Military Services for local procurement." The DSA Manager makes the decision that the item of supply shall be

"centrally procured by the DSA Manager for DoD as a whole, or that the item is decentralized to the using Military Services for local procurement from the General Services Administration or commercial sources." "Local Purchase," the last of the terms defined, is said to mean: "The action of a requisitioning or using activity to purchase, for its own use or for use by supported units, items of supply authorized for local purchase from commercial sources."

This regulation, DSAR 4140.39, is entitled "Authorization for Local Purchase of DSA Centrally Procured Items." Aside from the definitions already described, it refers to the two methods of procurement of DSA-managed items—centralized and decentralized—and with certain immaterial exceptions it authorizes two kinds of "[l]ocal purchase of any DSA centrally procured, commercial-type item": (1) to fill an emergency, immediate use requirement, and (2) where the procurement line item does not exceed $2,500.

DSAM 4140.2 and DSAM 5335.1 revise and increase to three the permitted instances of local purchase of centrally procured items as follows: (1) for emergency, immediate use, (2) where the value of the local purchase will not exceed $10, and (3) when authorized specifically by the "central item manager." DSAM 5335.1 then adds this sentence, presumably the language relied upon by the defendant: "General Services Administration (GSA) and Defense Logistics Services Center (DLSC) excess listings are a primary source of supply." The sentence plainly refers to the three kinds of authorized local purchases of centrally procured items.

The Government's contention is, apparently, that the procurement of boxes which took place in the instant case was a "local purchase," for which GSA was designated as a "primary source of supply," and that the designation prevailed despite and during the term of the contracts with plaintiff.

It is difficult to accept that the term "local purchase" could ever have included such systematic, substantial procurement of boxes as here took place under the contracts with plaintiff. For instance, at one time, at least, during the period here involved, under DSAR 4140.39, effective June 13, 1969 (the only one of the three regulations bearing an effective date),

local purchases were permitted only in emergencies and for items whose value was not in excess of $2,500. Moreover, the term "local purchases" seems to be limited to items "centrally" procured or managed. No showing has been made that (1) boxes were a "DSA-Managed Item," (2) that they were such an item "centrally procured" or, (3) that the procurement here was a "local purchase" of a DSA-managed item, centrally procured. If, as has not been shown, fiberboard boxes were a "DSA-Managed Item," it seems most likely that the procurement of boxes by the Depot was not a local purchase of a centrally procured item but rather a "local procurement" of a "decentralized" item of supply.

The three regulations are thus not shown to be applicable to the present case. They are addressed to "local purchases" as an exception to "centralized procurement" of "DSA-Managed Items," and there has here been no proof that boxes were such items, so procured, and that the Depot's purchases were "local purchases."

The regulation published in the Federal Register, ASPR 5-201, 32 CFR § 5.201 (1969),[3] is similarly not shown to be applicable. It too relates to "local purchases"; it provides that items "decentralized for local purchase * * * will be ordered from the [GSA] Depots unless delivery requirements cannot be met." Here, again, there is no showing that the formal and very substantial procurement which took place was a "local purchase" and thus no showing that the regulation is applicable, and no need to reach questions as to the force of the regulation, were it applicable.

Another defense raised by the Government would justify orders to GSA on the ground that plaintiff frequently failed to meet the delivery-time requirements in the contract—14 calendar days in the first contract and 10 working days in the second and third contracts—and that GSA had a better rec-

[3] "§ 5.201 Procurement from General Services Administration stores depots.
"It is the policy of the Department of Defense that for an item which has been decentralized for local purchase and which is available from the General Services Administration stores depots, such items will be ordered from the Depots unless delivery requirements cannot be met. The mandatory provisions of Department of Defense, General Services Administration Interagency Purchase Assignments (§ 5.1201-7) are not applicable to decentralized items which are within these assignments and which are available from the stores depots. Such items will be ordered in accordance with the above stated policy. [28 F.R. 12562 Nov. 23, 1963]"

ord in making deliveries. Plaintiff was late in delivering 75 percent of its orders. According to a rating system used by the Depot, plaintiff got "poor" and "very poor" marks for delivery more than 50 percent of the time. GSA delivered 60 percent of orders placed with it in 14 days or less; plaintiff delivered only 25 percent of its orders in that number of days.

The comparison between plaintiff and GSA in this respect is unfair. GSA had the advantage of a revolving fund which financed advance buying and warehousing of boxes until they were needed. Moreover, there is evidence that plaintiff's poor delivery record was due in substantial part to the fact that the Depot ordered from plaintiff all of its requirements of the special "full-flap" box which took more time and trouble to manufacture than regular boxes. Orders for these boxes, while within the contract, were unexpectedly large in volume and they slowed plaintiff down in making deliveries of both the special and regular boxes. Nevertheless, it does seem that plaintiff's delivery record was far from perfect, and that GSA's record was substantially better.

The contracting officer testified, in support of the defense based on delivery records, that the Depot's war-related mission was such that it could not have tolerated plaintiff's delivery record on all the boxes the Depot needed. The testimony is rejected as unconvincing. It was self-serving, given by an officer not particularly expert, and not corroborated by contemporary documents or any communication of such a view to plaintiff at the time.

Further, an exchange of letters early in the third contract, between plaintiff and the Depot's general counsel, evidences recognition by the Depot that even orders for boxes needed in 24 hours were by the contract to be offered to plaintiff. It appears that in October 1969, the Depot solicited bids on a contract for boxes to be supplied within 24 hours. Plaintiff promptly protested, citing a clause in the third contract [4] providing that orders for boxes required sooner than 10 working days must first be offered to plaintiff, and could be placed elsewhere only if plaintiff declined the business. The

[4] "e. If delivery of any quantity of an item covered by the contract is required by reason of urgency prior to the earliest date that delivery may be specified under this contract and if the Contractor will not accept an order providing for the accelerated delivery, the Government may procure this requirement from another source."

Depot's general counsel agreed, and replied that the invitation was designed to, and would be amended to provide only for orders of those boxes for 24-hour delivery as plaintiff first refused.

The defendant's concern over plaintiff's delays in deliveries is greater now than it was at the time. At the time, there may well have been adequate ground to terminate plaintiff for default. This, however, the Government deliberately chose not to do. The contracting officer testified that he did not terminate plaintiff's contract for the reason that the Depot could not have obtained better deliveries by going elsewhere. The Depot complained of plaintiff's deliveries only to the extent of issuing three cure notices, and in all three instances plaintiff cured the default in the time allowed. In no other way did the Government seek to urge plaintiff to make faster delivery or deliveries as required by the contract.

Having taken no other steps to complain or to terminate the contract at the time, the Government cannot now raise plaintiff's delay as a retroactive default to excuse its own breach. The delay was waived. *Cf. De Vito* v. *United States*, 188 Ct. Cl. 979, 413 F. 2d 1147 (1969).

There is no valid defense to the claim of breach.

For the breach, plaintiff claims damages composed of estimated lost profits under all three contracts, at 10 percent of the dollar volume of business diverted from it to GSA, and an operating loss of $34,831.72 at the Clearfield branch plant for the year of the 1969–70 contract.

Lost profits may not be recovered, by reason of the termination-for-convenience clause, present in all three contracts. Though the contracts were breached without reference to or reliance upon the termination-for-convenience clauses, it is settled that the clause nevertheless restricts the damages recoverable for the breach to those which would have been allowable under the convenience-termination clause, had it been invoked. *Nesbitt* v. *United States*, 170 Ct. Cl. 666, 345 F. 2d 583 (1965), *cert. denied* 383 U.S. 926 (1966); *G. C. Casebolt Co.* v. *United States*, 190 Ct. Cl. 783, 421 F. 2d 710 (1970); *John Reiner & Co.* v. *United States*, 163 Ct. Cl. 381, 325 F. 2d 438 (1963), *cert. denied*, 377 U.S. 931 (1964).

In *Nesbitt* v. *United States*, *supra*, the court held that even if plaintiff's contract be deemed, as alleged, to be a contract for all of the Government's requirements, the Government could still have placed orders elsewhere, on a partial termination for convenience from time to time; and that the omission to invoke the termination clause "makes no difference and that the clause nevertheless sets the limit on any recovery." 170 Ct. Cl. at 669, 345 F. 2d at 585. The case is thus particularly apposite, for the convenience-termination clause in the contract here also permits termination "in whole, or from time to time in part." 32 CFR § 8.701(a) (1969) subparagraph (a), April 1966 text.[5]

Alleged lost profits aside, there remains the operating loss of $34,831.72 suffered by plaintiff at its Clearfield branch in the year of the third, 1969–70, contract.

By the reasoning of *Nesbitt* v. *United States*, *supra*, plaintiff is in the position as if from time to time during the third contract the Depot notified it of a partial termination to the extent of a particular order placed with GSA for boxes which should, under the contract, have been ordered from plaintiff. Such a partial termination would surely not have required plaintiff to abandon performance. The Government was in reality and in the hypothetical partial, repeated terminations, insisting upon performance by plaintiff. "Reasonable commercial judgment" required that plaintiff continue performance. *Northern Helex Co.* v. *United States*, 197 Ct. Cl. 118, 129, 455 F. 2d 546, 553 (1972).

In establishing its plant at Clearfield, in preparation for the Government's orders, plaintiff is to be analogized to the contractor who buys a bulldozer to perform a Government contract which is then terminated for the Government's convenience. *Appeal of Grimsrud*, ASBCA No. 7971, 1962 BCA ¶3562.

The plant was established on the strength of the award of the third contract, and closed in less than 6 months, with

[5] "(a) The performance of work under this contract may be terminated by the Government in accordance with this clause in whole, or from time to time in part, whenever the Contracting Officer shall determine that such termination is in the best interests of the Government. Any such termination shall be effected by delivery to the Contractor of a Notice of Termination specifying the extent to which performance of work under the contract is terminated, and the date upon which such termination becomes effective."

a loss of $34,831.72 for lack of orders. It would not have been established without the contract and its promise of all the Depot's box purchases for a year. Plaintiff had no right, of course, to expect further contracts, but it could and did expect that the Government's business would enable it to break even, at the new plant, in the year of the contract; meantime other business might be found. That the expectations were not unreasonable is shown by the volume of the GSA's purchases for the use of the Depot, $466,720.98. Had this business come to plaintiff, the reasonable profit, at 10 percent, would have approximated the losses suffered.

The Government argues that since a substantial part of the $446,000 worth of boxes was ordered in the first 2 months of the contract, before the Clearfield plant became operational in mid-November, 1969, the arithmetic of hypothetical profit for the Clearfield plant shows that it would have lost $2,000 even had it received the business diverted to GSA. Perhaps so, but with the larger volume of business, the plant would not have closed in March 1970, when it did, and in the months following March might well have netted $2,000 and more from private business. Such *de minimus* calculations as the Government relies upon are beside the point—which is that the plant was established—reasonably so and at the urging of the Government—in preparation for the performance of the work under the contract. In consequence, when the plant was forced to close in 6 months, for lack of Government orders, in breach of the contract, its operating loss is a fair approximation of the "initial costs and preparatory expense," within the meaning of the convenience-termination clause.[6] The result is no more a penalty or damages for a tort or for consequential damages than any conventional award of out-of-pocket losses for breach of contract or an allowance, in an administrative termination settlement, of substantial preparatory costs, economically wasted by reason of an early convenience termination.

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[6] 32 CFR § 8.701(a) (1969) subparagraph (e)(11)(A), April 1966 ed. provides as follows:

"(11) The total of—

"(A) The costs incurred in the performance of the work terminated, including initial costs and preparatory expense allocable thereto, but exclusive of any costs attributable to supplies paid or to be paid for under paragraph (e)(1) hereof;"

It is immaterial to the stated result that such orders as were placed were communicated to plaintiff's main plant at Ontario, California, and that $70,000 of the $106,000 in orders placed after the Clearfield plant became operational were in fact filled at the Ontario plant. The loss at Clearfield was hardly deliberate or self-inflicted to buttress the case for breach. Plaintiff doubtless planned to fill some orders at its main plant, and it cannot be expected that the main plant should have been entirely deprived of what business there was, in favor of the new branch plant. Had the Depot ordered from plaintiff the boxes it required, the additional orders would doubtless have been filled at Clearfield.

It may be said that the analogy to *Appeal of Grimsrud*, *supra*, is not entirely apt, that the equation of the operating loss with allowable "preparatory expense" is not exact, or that some more refined basis exists for computing plaintiff's "preparatory expense." The answer to such doubts can only be that the use of the amount of the operating loss as a measure of initial costs and preparatory expense is a reasonable and the best possible method for computing damages, on the limited record presented. As such, it is sufficient basis for a verdict. It is difficult and perhaps impossible to apply the allowable-costs convenience-termination rules literally in judicial proceedings for a determination of breach-of-contract damages. Analogies must be used, and leeway allowed to absorb the strains inevitable in a judicial inquest into damages under a set of rules written for an administrative negotiation. *G. L. Christian & Associates* v. *United States*, 160 Ct. Cl. 1, 17, 312 F. 2d 418, 427, *rehearing denied*, 160 Ct. Cl. 58, 320 F. 2d 345, *cert. denied*, 375 U.S. 954 (1963), *rehearing denied*, 376 U.S. 929, 377 U.S. 1010 (1964), 170 Ct. Cl. 902, *cert. denied*, 382 U.S. 821 (1965); *Manloading & Management Associates, Inc.* v. *United States*, 198 Ct. Cl. 628, 461 F. 2d 1299 (1972), 203 Ct. Cl. 725 (1973). Especially is this so in the unusual case presented in which the preparatory expenses are not the costs of preliminary work on a single job in an existing and continuing plant, but the losses suffered when a whole plant is established to perform one piece of work and closes with a loss when the work is not forthcoming.

This is still a breach of contract case, though damages are to be determined under the convenience-termination clause. In estimating damages, this court "occupies the position of a jury under like circumstances." *Specialty Assembling & Packing Co.* v. *United States*, 174 Ct. Cl. 153, 184, 355 F. 2d 554, 573 (1966). Judgment against a liable defendant for damages suffered is not to be withheld for inability to compute the damages precisely; mathematical precision is not essential to the determination. *Eastman Co.* v. *Southern Photo Co.*, 273 U.S. 359, 379 (1927); *Brand Investment Co.* v. *United States*, 102 Ct. Cl. 40, 44, 58 F. Supp. 749, 751 (1944), *cert. denied*, 324 U.S. 850 (1945). In the absence of a more reliable method of determining damages, the amount of the verdict in a bench trial, whether comprising "initial costs and preparatory expense" or more traditional elements of damages, may, therefore, be as unarticulated—as approximate or, even, as subjective—as a verdict by a jury.

On these principles it is concluded that $34,831.72, the amount of the first year operating loss at the Clearfield plant, is a "fair and reasonable approximation" of the damages, such as a termination settlement officer might allow, or, if not, then in any event such as a jury might award. *Specialty Assembling & Packing Co.* v. *United States*, *supra*; *cf. WRB Corp.* v. *United States*, 183 Ct. Cl. 409, 425 (1968).

Plaintiff is entitled to recover $34,831.72.

FINDINGS OF FACT

1(a). Plaintiff is a closely-held California corporation, organized in 1967, with its principal office and place of business at Ontario, California, about 40 miles east of Los Angeles. It is engaged in the manufacture of boxes of various sizes, principally from sheets of corrugated fiberboard.

(b) The majority of the outstanding stock of the plaintiff corporation is owned by William J. Warren, its president, and Edward F. Hansen, its vice president. Both Mr. Warren and Mr. Hansen testified on behalf of plaintiff.

2. The contracting agency involved in the case is the Defense Depot Ogden, Utah (DDOU), in these findings called the Depot, a facility of the Defense Supply Agency, Depart-

ment of Defense. The function of the Depot, at the relevant times, was, on receiving material release orders from the various defense supply centers for military supplies, to select, pack and ship the needed supplies. For supplies such as electronic equipment, clothing, textiles and general supplies, the Depot had a world-wide mission—that is, it responded to orders from the military throughout the world.

3(a). Suit is brought for breach of three consecutive contracts for the supply of boxes, awarded by the Depot to the plaintiff in 1967, 1968 and 1969, each for a period of 1 year.

(b) The first contract, No. DSA–003–68–C–008, awarded July 26, 1967, and herein called the 1967–68 contract, covered only Schedules VI and VII of the seven schedules in the solicitation, a minor part of the entire solicitation.

(c) The second, No. DSA–003–69–C–008, awarded July 31, 1968, and called the 1968–69 contract, covered only Schedule VII of the seven schedules in the solicitation, also a minor part of the solicitation.

(d) The third, No. DSA–003–70–D–0126, awarded September 3, 1969, and called the 1969–70 contract, covered Schedules III–VI of the six schedules of the solicitation, a large part of that solicitation and the only substantial award of the three.

4(a). All three contracts were what is known as requirements-type contracts.

(b) The 1967–68 contract contained the following provision on the subject of requirements:

> THIS IS A REQUIREMENT TYPE CONTRACT FOR FIBERBOARD BOXES. THE CONTACTOR WILL BE REQUIRED TO FURNISH THE SUPPLIES ORDERED DURING THE LIFE OF THE CONTRACT IN THE QUANTITIES ORDERED WITHIN THE LIMITATIONS SPECIFIED HEREIN. THE GOVERNMENT WILL BE OBLIGATED TO ORDER FROM THE CONTRACTOR ALL OF ITS REQUIREMENTS OF THE ITEMS PROVIDED HEREUNDER THAT MAY IN THE JUDGEMENT [sic] OF THE CONTRACTING OFFICER BE REQUIRED DURING THE CONTRACT TERM.

(c) Both the 1968–69 and the 1969–70 contracts contained the following provision:

> REQUIREMENTS: (1966 OCT)
>
> a. This is a requirements contract for the supplies or services specified in the Schedule, and for the period set forth therein. Delivery of supplies or performance of services shall be made only as authorized by orders issued in accordance with the clause entitled "Ordering". The quantities of supplies or services specified herein are estimates only and are not purchased hereby. Except as may be otherwise provided herein, in the event the Government's requirements for supplies or services set forth in the Schedule do not result in orders in the amounts or quantities described as "estimated" or "maximum" in the schedule, such event shall not constitute the basis for an equitable adjustment under this contract.
>
> b. Except as otherwise provided in this contract, the Government shall order from the Contractor all the supplies or services set forth in the Schedule which are required to be purchased by the Government activity identified in the "Ordering" clause.
>
> c. The Government shall not be required to purchase from the Contractor, requirements in excess of the limit on total orders under this contract, if any.

There is no provision in either the 1968–69 or the 1969–70 contract which would make operative the "except as otherwise provided" clause in the foregoing subparagraph (b).

(d) The 1969–70 contract contained a further subparagraph under REQUIREMENTS, not appearing in the 1968–69 contract, providing as follows:

> e. If delivery of any quantity of an item covered by the contract is required by reason of urgency prior to the earliest date that delivery may be specified under this contract and if the Contractor will not accept an order providing for the accelerated delivery, the Government may procure this requirement from another source.

5(a). Provisions for minimum and maximum orders and delivery time are set out below. The major provision as to which an issue has been raised is that which required delivery in 14 calendar days (in the first contract) and 10 working days (in the second and third contracts) of the maximum of 6,000 boxes which could be required in any delivery.

(b) *The first, 1967–68, contract.* (1) The contract contains the following with respect to maximum and minimum quantities and deliveries:

MINIMUM AND MAXIMUM REQUIREMENTS.

a. Orders will not be placed for less than the minimum or in excess of maximum quantities shown in the schedules of any specific size except as provided in para. c. below.

b. The maximum contract quantity that the Government can require the contractor to deliver in the initial delivery or subsequent deliveries against the delivery order shall be as follows:

* * * * *

2. Schedules * * * VI, and VII— * * * 6000 boxes of a specific size or a total aggregate quantity of 6000 boxes per day for Schedules * * * VI, & VII.

c. Subject to acceptance by the contractor, orders may be placed for less than the minimum or in excess of the maximum requirements as provided above. If contractor fails to reject such orders within 24 hours after receipt, such failure will constitute acceptance by the contractor. Rejection of any such order will relieve the Government of its obligation hereunder and will permit purchase of the rejected quantitities from other sources.

VARIATION IN QUANTITY: A variation in quantity of plus or minus 5% will be allowed as to any single item order.

(2) Delivery of the daily maximum of the 6,000 boxes, or less, was required to be made within 14 calendar days, as follows:

DELIVERY SCHEDULES:

Delivery is REQUIRED to be made in accordance with the following:

* * * * *

APPLICABLE TO SCHEDULES * * * VI, AND VII:

* * * * *

b. It is * * * mandatory that on any individual order exceeding 6000 boxes, delivery of the first 6000 boxes shall be effected within 14 calendar days after placement of order. Additional deliveries thereof will be made at the rate of not less than 6000 of each indi-

vidual size ordered each 24 hours after the date of the initial delivery of 6000 boxes.

(c) *The second, 1968–69, contract.* (1) The contract contains the following with respect to maximum and minimum quantities and deliveries:

DELIVERY ORDER LIMITATIONS:

(a) Minimum Order: When the Government requires boxes covered by this contract less than the minimum quantities indicated in the schedules of any specific size, the Government shall not be obligated to purchase, nor the contractor obligated to furnish the boxes under this contract.

(b) Maximum Order: The Contractor shall not be obligated to deliver, in the initial delivery or subsequent deliveries, in excess of the quantities as follows:

* * * * *

3. *Schedules* * * * *VII*—6000 boxes of a total aggregate quantity of 6000 boxes per working day.

(c) Notwithstanding the foregoing, the contractor shall honor any order received which exceeds the maximum order limitations set forth above unless the order or orders which exceed the maximum limitations are rejected within 24 hours after receipt, together with notice of intent not to make shipment of the items called for and the reasons therefor. Upon receipt of this notice, the Government may secure supplies from another source.

(d) The Government is not required to order a part of any one requirement from the contractor when such requirement exceeds the maximum order limitations set forth in "b" above.

(2) In this contract, delivery of the daily maximum of 6,000 boxes, or less, was required to be made within 10 working days, as follows:

DELIVERY SCHEDULES:

Delivery is REQUIRED to be made in accordance with the following:

* * * * *

APPLICABLE TO SCHEDULES * * * VII:

* * * * *

b. It is * * * mandatory that on any individual order exceeding 6,000 boxes, delivery of the first 6000 boxes shall be effected within 10 working days after placement of order. Additional deliveries thereof will be made at the rate of not less than 6000 of each individual size ordered each 24 hours after the date of the initial delivery of 6000 boxes.

(d) *The third, 1969–70, contract.* (1) The contract contains the following with respect to maximum and minimum quantities and deliveries:

DELIVERY ORDER LIMITATIONS (1965 AUG)

a. Minimum Order: When the Government requires supplies covered by this contract in an amount of less than the minimum quantities shown in the schedule of any specific size the Government shall not be obligated to purchase nor the contractor obligated to furnish any supplies under this contract.

b. Maximum Orders: The contractor shall not be obligated to honor:

* * * * *

2. Schedules III through VI:

(a) Any order for a single call in excess of 12,000 boxes.

(b) Any order for a combination of calls in excess of 12,000 boxes, or

(c) A series of orders from the same ordering office in the course of 4 calendar days which in the aggregate call for quantities to the extent that the aggregate is in excess of the limitations provided in a and b above.

c. Notwithstanding the foregoing the contractor shall honor any order received which exceeds the maximum order limitations set forth above unless the order or orders which exceed the maximum limitations are returned to the issuing office within 5 calendar days from the date of issue thereof, together with written notice of intent not to make shipment of the item called for and the reasons therefore [sic]. Upon receipt of this notice the Government may secure the supplies from another source.

d. The Government is not required to order a part of any one requirement from the contractor when each requirement exceeds the maximum order limitations set forth in "b" above.

(2) Delivery of 6,000 boxes (half the daily maximum of 12,000 boxes, or less) was required to be made within 10 working days, as follows:

> DELIVERY SCHEDULE: (Applicable to Schedules III thru VI)
>
> Delivery is REQUIRED to be made in accordance with the following:
>
> * * * * *
>
> b. (1) Orders for 6,000 boxes or less of each separate call to an aggregate quantity of 6,000 boxes shall be delivered at destination within ten (10) working days after receipt of a call.

(3) As noted above in connection with the requirements provisions (finding 4(d)) this contract also provided that if delivery of an item covered was required by reason of urgency, prior to the date which might under the contract be specified, "and if the Contractor will not accept an order providing for the accelerated delivery, the Government may procure this requirement from another source."

6. Each of the three contracts incorporated by reference the termination-for-convenience clause of April 1966 required by ASPR 7–103.21c, 32 CFR § 7.103–21(c), and set out in ASPR 8–701a, 32 CFR § 8.701(a) (1969).

7(a). For some time prior to the award of the third contract, Mr. A. J. Bybee, the head of the procurement branch at the Depot, and also the contracting officer on the three contracts with plaintiff, and other depot officers had solicited plaintiff and other box manufacturers to locate a branch plant in the Salt Lake City-Ogden area, near the Depot, in the interest of promoting competition and facilitating the Depot's procurement of boxes.

8(a). Plaintiff was willing, if it could get enough business from the Depot to support such a plant. The amount of business under the contracts prior to the third contract was, however, insufficient. On the award of the third contract, plaintiff felt there would be enough business to support a branch plant and it acceded to the solicitation of the Depot.

(b) Thus, following the award on September 3, 1969 of Schedules III through VI of the 1969–70 contract, a large part of the solicitation, plaintiff established a branch plant

at Clearfield, Utah, 15 miles from the Depot in Ogden. Plaintiff expected that the costs of the plant would be covered, in the first year, by the Depot's business, that is, that the plant would be supported by the business under the third contract, for the period of the contract.

9. Clearfield, Utah, was selected because in plaintiff's conversations with the Depot personnel it had appeared that there was only one source of containers in the local area. While plaintiff's officers expected that the Depot business would support this branch plant, they hoped to develop business from other sources, such as other military and Air Force bases in the area.

10. Since plaintiff's bid on the third contract had specified its plant at Ontario, California, as the place of performance, plaintiff advised Mr. Bybee of its decision to locate a plant at Clearfield and arranged for a modification of the contract to permit performance either at Ontario or at Clearfield. The modification was effective November 18, 1969, and the plant became operational at about that time. Plaintiff did not expect to perform the contract solely at Clearfield.

11. While the Depot ordered boxes from plaintiff under all three contracts, it did not by far order all of the boxes it needed and used, and it did not use plaintiff as a source of supply to be drawn upon first. All during the time of the three contracts, the Depot, before it would place orders with plaintiff, would first procure boxes (of the kind covered by the contracts with plaintiff) from General Services Administration (GSA), particularly from GSA Denver, which, pursuant to a system to be described, stocked boxes to meet the Depot's forecasted requirements.

12. During the third contract the volume of the Depot's orders to plaintiff was $146,099. In the same period the Depot ordered boxes of the same type from GSA whose manufacturers' price to GSA was $466,720.

13. The Depot's procurement of boxes from GSA took place pursuant to a GSA program for common buying of supplies, in large quantities, for federal agencies at their instance. The supplies were stocked in GSA stores and warehouses and distributed to agencies, as were the boxes now involved, on request by stock number listed in a GSA catalog

or stock list of items which have been standardized for central GSA procurement. There is no contention or evidence that plaintiff had actual notice of the system of procurement by GSA for the Depot, except such legal notice as it may have had by virtue of regulations quoted below in finding 28.

14. The GSA purchasing and warehousing system is not supported by appropriations, but by a revolving fund, maintained by payments for supplies by the using agencies sufficient to enable GSA to "break even." The Depot paid such a "break-even" price for the boxes it received from GSA.

15(a). On receipt, from the storage and transportation branch, of a requisition for boxes, the Depot's supply branch would at the relevant times first check its own shelves to see whether it had the necessary boxes on hand. If the boxes were not on hand the branch ordered them from GSA, provided (1) they were of a size and style stocked by the GSA and (2) GSA could meet the necessary delivery requirement.

(b) If GSA were unable to furnish the boxes in the time required, the supply branch would arrange to have the boxes fabricated in the Depot's own box shop (some were made there) or, more often, request the Depot's procurement branch to purchase them, in the case of the boxes of the kind under the contract then in effect.

16(a). Requisitions for supplies from commanders in the field would designate a priority for shipment. High priorities for shipments to Southeast Asia were more frequent during the period of the first two contracts than during the third, but they accounted for a substantial number of the boxes used by the Depot during all three contracts.

(b) The materials release order, whose receipt by the Depot initiates a shipment, repeats the priority given on the original requisition. The Depot's storage and transportation branch then selects the stock described in the requisition, and places a requisition with the supply branch for the particular size and style of boxes necessary to package the items for shipment.

17(a). The supply branch had two procedures for obtaining boxes from GSA, one for emergency needs—that is, requiring delivery within 15 days—and the other for routine needs.

(b) For an emergency need, a technician in the branch would telephone the GSA regional office in Denver to determine whether the boxes were available from GSA. GSA in Denver would then screen its computer listings to see whether the boxes were available, and, if so, where.

(c) If the boxes were available at the GSA warehouse in Clearfield, Utah, only 15 miles from the Depot in Ogden, GSA would authorize their release by telephone and the boxes would be delivered, possibly on the same day as ordered, by GSA truck or by a Depot truck sent from Ogden.

(d) If the boxes were available in the time required, the Depot's supply branch would do the paper work and follow up the telephone order with a completed requisition.

(e) When GSA Denver advised the Depot that it could not meet a 15-day delivery requirement, the Depot would arrange to fabricate the boxes in the Depot's box shop or, more often, obtain the needed boxes through the procurement branch, under a requirements-type contract such as the outstanding contract with plaintiff.

18(a). The procedure for boxes needed in a routine period such as 30 or 45 days was for a requisition for the boxes to be mailed to the GSA regional office in Denver.

(b) On receipt of the requisition, if the boxes were not available in the sense of being physically on hand, GSA Denver would backorder, i.e., it would send the Depot's supply branch a status report indicating that the boxes were already on order from a GSA supplier and stating when GSA could make delivery. The Depot's supply branch, in turn, would advise the requesting office of the promised delivery date and inquire whether such delivery was acceptable. If the delivery offered was not acceptable the supply branch would cancel the order and have the procurement branch place an order for the boxes under the existing requirements-type contract.

(c) The Depot had few cancellations of such orders to GSA during the period here involved, because the spaced deliveries by GSA's suppliers were seldom so far apart as to prevent the routine needs from being satisfied.

19(a). GSA procured the boxes which it supplied to the Depot, pursuant to contracts with suppliers providing for 70-day delivery. Purchases were made regularly, under these contracts, as GSA's shelf stocks were depleted by Depot and agency orders. Thus purchases were made in advance of Depot orders, and not to fill a particular order.

(b) Orders were placed, and automatically reviewed by a computerized system when shelf stocks reached a set level, so as to keep on hand sufficient stock to meet the forecasted needs of the Depot and any other agencies using the GSA's system. The forecasts of anticipated demand were based on data concerning past use, furnished by GSA and periodically revised.

(c) In this manner GSA was able to meet the Depot's orders for 15, 30 and 45 day delivery though its contracts with suppliers required only 70-day delivery.

(d) Under this system GSA in the 3-year period involved met the Depot's needs for most of the boxes in use by the Depot, leaving for procurement from the plaintiff only boxes which GSA could not supply in the time required and boxes not supplied by GSA at all and on the schedules of the contract with plaintiff—this last category called, by a Depot witness, the "cat and dog" boxes.

20. GSA records, which may not be complete, show that in the three periods corresponding to the three contracts between the Depot and plaintiff, the total price to GSA of the boxes bought for the Depot, of the kind covered by the contracts with plaintiff, was as follows:

$42,218.34 in 1967–68 (5 months)
45,409.50 in 1968–69
466,720.98 in 1969–70

21(a). In the year of the third contract plaintiff's main plant at Ontario, California filled $40,000 in orders placed before the Clearfield plant was opened, and $70,000 of the $106,000 in orders placed thereafter. The total of the Depot's orders from plaintiff under the third contract was, as noted above, $146,099.

(b) The Clearfield plant was thus virtually idle. Government orders in sufficient volume were not forthcoming. It did a gross of $54,350.91, filled $36,000 of Depot orders and

closed the following March, in the spring of 1970, with a net operating loss of $34,831.

22(a). Some time prior to the solicitation of the third contract on July 24, 1969, Mr. Bybee had become concerned over what on the stand he called a possible "confusion" and "misunderstanding" from the requirements clause in use. After consultation with counsel, the following "Note" was drafted and added to a solicitation for a similar contract issued in August 1970:

> With reference to paragraph (b) of above Requirements Clause, [the same clause as appears in the third contract, see finding 4(c)] boxes available from Government Agencies *will not* be ordered under this contract. [Emphasis in original.]

(b) Mr. Bybee testified that the Note was intended to clarify the contracting process theretofore in effect, not to alter the existing procurement practices.

(c) The Note appears in an invitation, not in dispute in this case, issued August 7, 1970. It does not appear in the invitation to bid on the third contract, issued, as noted above, on July 24, 1969.

23(a). Plaintiff was late in its delivery—required within 10 working or 14 calendar days of the order—of more than 76 percent of the orders placed with it. According to the agency's rating system, its performance was "poor" or "very poor" on more than 50 percent of its deliveries.

(b) GSA Denver had a better record than plaintiff in meeting delivery requirements. GSA delivered 61.6 percent of the orders in 14 days or less; the plaintiff delivered only 23.65 percent of its orders in the same number of days. GSA's advantages were its system of warehousing in advance to meet the Depot's requirements, the costs of which the Depot or GSA presumably paid, and the fact that GSA was not called on to provide the Depot with a type of box known as special full flap (SFF), especially difficult and time-consuming to make.

24(a). Of all the boxes ordered by the Depot from plaintiff, 35.4 percent were the special full flap (SFF) containers. None of these were ordered from GSA. An unusually large number were ordered from plaintiff, more than had been

expected, although the orders were permissible under the contract.

(b) These SFF boxes were more profitable to the manufacturer than the more commonplace regular slotted containers, but also more difficult to manufacture.

(c) There were available on the market special machine attachments for the simplified making of SFF boxes. Plaintiff did not invest in such a machine. The record does not show an economic relationship between the price of the machine and the circumstances obtaining.

(d) The manufacture of SFF boxes in the quantities ordered by the Depot created a strain on plaintiff's manufacturing facilities which resulted in delays in deliveries of not only the SFF boxes but also other boxes.

25. Factors, in addition to the difficulties in making SFF boxes, causing late deliveries, were 1) delivery time from plaintiff's plant in Ontario, California to the Depot in Ogden, Utah and 2) delivery time in ordering fiberboard, in a time of short supply.

26(a). Mr. Bybee testified that in his opinion the Depot's mission and the frequency of high priority shipments to Southeast Asia, including Viet Nam, during the time of plaintiff's three contracts were such that the Depot could not have tolerated on all its box orders such poor delivery performance as plaintiff's overall record indicates.

(b) There is no evidence that this view was shared by officers senior to the witness or more competent than he in the matter, or that he or others urged plaintiff to hasten its deliveries, other than by the address to plaintiff of three default notices, all of which were cured in the time specified.

(c) Mr. Bybee did not cancel or terminate the contract because of the late deliveries. His reason was that better delivery could not have been obtained elsewhere.

27. The reason for the preference in orders which was given to GSA over plaintiff was not plaintiff's delivery-time performance but a belief that the purchases from GSA were required by regulations set out in the following finding.

28(a). Depot personnel testified that in their practice of ordering boxes from GSA while the contracts with plaintiff were in effect they were acting in compliance with regula-

tions, namely, DSA Regulation 4140.39, DSAM 4140.2 and DSAM 5335.1. All were introduced in evidence; only one, DSA Regulation 4140.39, bears a date, June 13, 1969. All are described by the Government as internal, that is, not published in the Federal Register or elsewhere publicly.

(b) There is no evidence that plaintiff had knowledge of these regulations prior to entering into any of the contracts.

(c) The Government in its post-trial brief relies on the latter two of these regulations, DSAM 4140.2 and DSAM 5335.1, and contends that they were issued presumably to implement Armed Services Procurement Regulation (ASPR) 5–201, 32 CFR § 5.201 (1969), set out below in this finding.

(d) The personnel who testified to the regulations they believed required them to order boxes from GSA despite the contracts did not know of a provision of ASPR on the subject.

(e) The first of the three internal regulations, DSAR 4140.39, provides as follows:

DEFENSE SUPPLY AGENCY
Headquarters
Cameron Station
Alexandria, Virginia 22314

DSAH–OP
13 Jun 69

DSA REGULATION
No. 4140.39

AUTHORIZATION FOR LOCAL PURCHASE OF DSA CENTRALLY PROCURED ITEMS

I. *PURPOSE*

To prescribe policy guidance and responsibilities for the authorization of requisitioning organizations local purchase actions for DSA centrally procured items.

III. *SCOPE*

This DSAR is applicable to HQ DSA and Defense Supply Centers (DSCs).

II. *GENERAL*

A. *Background.* Procurement of DSA-managed items is performed on both a centralized and decentralized

basis under the provisions of DoD, DSA, and Military Services regulations. DSA centrally procured items are those items for which DSCs are responsible for supplying customer requirements through centralized procurement as the normal method of supply. Under certain conditions a DSA centrally procured item may be obtained by a requisitioner through a local purchase action. The criteria established herein were developed to identify these conditions.

B. *Policy*

1. Local purchase of any DSA centrally procured, commercial-type item, except drugs, pharmaceuticals and subsistence, is authorized at the option of the using/requiring organization, without referral to DCSs provided the following criteria apply:

a. The procurement is for an emergency, immediate-use requirement.

b. The procurement line item value does not exceed $2500.00.

* * * * *

4. Local purchase actions under the provisions of this DSAR will be included in demand data accumulated for centrally-procured items.

5. DSCs will not return requisitions to using/requiring organizations for a local purchase action for DSA centrally procured items.

C. *Definitions*

1. *DSA Centrally Procured Items.* Items centrally procured by the DSA Manager for supply support of all authorized requisitioners. DSA-managed items designated for centralized procurement are assigned Supply Status Codes 1, 3, 4, 5, 6 or 8.

2. *DSA-Managed Items.* Items managed by the DSA Manager normally for DoD as a whole, and which are either centrally procured by the DSA Manager or are decentralized to the using Military Services for local procurement.

3. *DSA Manager.* A DSC having responsibility for management method determination to the effect that the item of supply is centrally managed by the DSA Manager for DoD as a whole, or that the item is decentralized to the using Military Services for local procurement from the General Services Administration or commercial sources.

4. *Local Purchase.* The action of a requisitioning or using activity to purchase, for its own use or for use

by supported units, items of supply authorized for local purchase from commercial sources.

This DSAR supersedes DSAR 4140.39 24 Oct 68, and Change 1.

* * * * *

(f) The second of the two internal regulations, DSAM 4140.2, one of the two relied upon by the defendant in its post-trial brief, provides in relevant part as follows:

> d. Requisitioning/requiring activities have the option of taking local purchase action for any DSA-integrated managed, centrally procured item, commercially available, provided:
>
> (1) Such actions are limited to immediate use requirements generated by emergency conditions such as a work stoppage, or
>
> (2) Such actions for a routine requirement were determined to be the most economical method of supply and the total line item value does not exceed $10.00.

(g) The third of the two internal regulations, DSAM 5335.1, the second of the two relied upon by the defendant in its post-trial brief, provides in relevant part as follows:

> a. Normally DSA activities will obtain supplies and equipment by requisitioning on the supply distribution system. Local purchase of centrally managed items, if available off the shelf from commercial sources, will be accomplished when authorized under the provisions of DSAM 4140.2 or when authorized specifically by the central item manager. General Services Administration (GSA) and Defense Logistics Services Center (DLSC) excess listings are a primary source of supply.

(h) ASPR 5-201, 32 CFR § 5.201 (1969), 28 Fed. Reg. 12562 (Nov. 23, 1963), provides as follows:

> § 5.201 Procurement from General Services Administration stores depots.
>
> It is the policy of the Department of Defense that for an item which has been decentralized for local purchase and which is available from the General Services Administration stores depots, such items will be ordered from the Depots unless delivery requirements cannot be met. The mandatory provisions of Department of Defense, General Services Administration Interagency Purchase Assignments (§ 5.1201-7) are not applicable to decentralized items which are within these assign-

ments and which are available from the stores depots. Such items will be ordered in accordance with the above stated policy. [28 F.R. 12562, Nov. 23, 1963]

29(a). By letter dated October 23, 1969, Mr. Warren, plaintiff's president, protested an invitation to bid issued by the Depot on October 17, 1969, shortly following the award of the third contract to plaintiff. The invitation for bid asked for bids on a contract to furnish fiberboard boxes on a 24-hour delivery schedule.

The invitation was subsequently withdrawn to avoid conflict with plaintiff's contract.

Mr. Warren's letter, addressed to Jack Fairclough, Esq., counsel to the Depot, took the position that the invitation of October 17, 1969 was a violation of the requirements provisions of the contract with plaintiff, under which, he wrote, plaintiff "has a legal and completely binding contract to provide all the government's requirements as clearly authorized in the contract."

The letter stated as follows:

1. It is my opinion that the above mentioned Invitation for Bid is in direct conflict and violation of the existing contract issued to Inland Container Inc. (Contract #DSA-003-70-C-0010) [sic]. The existing contract which Inland now has provides very clearly on Page 13 under "Requirements" (1966 Oct) paragraphs a, b, c, d, e, f and g that Inland Container Inc. is obligated to supply and the government is obligated to buy "all the supplies or services set forth in the schedule which are required to be purchased by the Government."

Paragraph e. specifically states that under urgent conditions, the government must first request Inland Container Inc. to meet the urgent delivery requirement and upon our refusal, may have the option to procure the requirement from another source. We are currently aware and have evidence that this provision of our current contract has been violated repeatedly. Inland Container Inc. desires to know what corrective action and or consideration will be made by the government to rectify these past and all future flagrant violations of our agreement. I believe Inland Container Inc. has a legal and completely binding contract to provide all the government's requirements as clearly outlined in the contract. Should any new contract or agreement be attempted which clearly conflicts with the existing contract to the

extent that Inland Container Inc. is deprived, after due consideration, preparation and performance, of the legal right to manufacture and deliver the requirements legally contracted for sufficient grounds would be established for legal action to prevent such an act.

(b) On the following day, October 24, 1969, Mr. Warren sent a further letter to Mr. Fairclough, amplifying plaintiff's objection to the published invitation:

> I would like to further clarify my recent letter to you regarding the type of legal action contemplated by Inland Container Inc. should the government award any new contract which violates the terms of our existing contract.
>
> Inland Container Inc. will immediately file suit against the government for profits lost as a result of being illegally deprived of our right to manufacture the goods called for and legally contracted for by the government in our existing contract.

(c) The Depot's counsel, Mr. Fairclough, responded on October 28, 1969. He wrote that the protested invitation would be amended to make it "clearer" that orders would be placed under the complained-of contract only if plaintiff under its contract refused the order calling for delivery in 24 hours.

The letter stated as follows:

> Reference is made to your letters of 23 and 24 October 1969, in which you protest the issuance of subject invitation in view of your requirements contract, issued pursuant to IFB DSA–003–70–B–0016.
>
> You first question said invitation because of a conflict in the Depot's duty to order boxes under your contract when a second contract is contemplated for the same boxes. The note on page 11 of IFB 0119 was to obviate any such conflict by causing orders to be placed under IFB 0016 first and under IFB 0119 only if the initial contractor could not deliver in 24 hours.
>
> In order to make this clearer IFB 0119 is being amended as follows:
>
> > "NOTE: The Government shall not be required to order from any contractor hereunder unless delivery is required in 24 hours and the contractors under

IFB DSA–70–B–0016 have refused such order calling for delivery in 24 hours."

* * * * *

With reference to your letters the foregoing information is considered to be ample reply to all objections you have voiced and your protests as to the issuance of IFB 0119 are rejected.

Intermediate Conclusions on Liability

30(a). The procurements by the Depot of boxes from and through GSA were purchases to fill requirements through GSA as an agent. The procurements were not merely acquisitions from a sister agency of supplies on the latter's shelf, for GSA bought to meet the Depot's forecasted needs. A purchase to meet requirements is no less so because done by an agent in advance of the need, on the basis of a forecast of requirements. GSA's purchases for use by the Depot were purchases by the Depot.

(b) The episode of the Note drafted by the contracting officer at about the time of the execution of the third, 1969–70 contract, and designed to explain that boxes "ordered" from other agencies would not be purchased under such a contract as plaintiff held (finding 22), but nevertheless not added to the contract with plaintiff, shows an understanding by the Depot that the contract was reasonably to be read as including the requirements of boxes actually being satisfied by procurement from GSA.

(c) The exchange of letters between the general counsel of the Depot and plaintiff concerning an invitation to bid on boxes to be delivered in 24 hours, issued shortly after the effective date of the third, 1969–70, contract shows that the Depot well understood the third, 1969–70, contract with plaintiff as requiring that orders for boxes to be delivered within 24 hours were required to be offered to plaintiff. This was not done; instead needs for such boxes were filled by procurement from GSA.

(d) The procurements from GSA were purchases of boxes "required" and "required to be purchased" (finding 4(c)) within the meaning of the contracts in suit. The purchases from GSA were therefore presumptively in breach of the

contracts with plaintiff, subject to any merit in the defenses made.

31(a). None of the four regulations (set out in finding 28), relied upon by the Government as directing or dictating the practice of procurement from GSA, required or directed that when boxes were under contract with a private source, as was here the case, the boxes should nevertheless be ordered from GSA in preference to being ordered in accordance with the contract.

(b) The three DSA regulations relied upon were internal to the Defense Supply Agency and plaintiff had neither actual nor constructive notice of them. They relate to "central procurement" of "DSA-managed items" of supply and to authorization for "local purchase" of such items. They have not been shown to be applicable to the instant case. It has not been made to appear that the procurement here involved was the kind contemplated by the regulations.

(c) The fourth regulation relied upon was published in the Code of Federal Regulations, and plaintiff thus had constructive notice of it. The regulation does not, however, affect the construction of the contracts with plaintiff, require disregard of its obligations, or give notice of the practice engaged in by the Depot of acquiring boxes from GSA before ordering under a private direct contract with a manufacturer such as was here in effect. Moreover, this regulation, too, relates to "local purchases" and the procurements here involved have not been shown to be such as to be subject to the regulation.

(d) The four regulations are neither justification for nor defense to the presumptive breach.

32. (a) The defense based on plaintiff's late deliveries has not been established. The contention of defendant that the urgent mission of the Depot in connection with the war in Southeast Asia did not permit the toleration of plaintiff's tardiness is rejected as not proven.

(b) The evidence on which it is based is found not to be probative. The underlying opinion testimony is self-serving, post-facto testimony; the opinion testified to is not shown to have been the opinion of officers more senior than the con-

tracting officer for boxes, and it was neither recorded nor communicated to plaintiff at the time.

(c) Evidence that the defendant did not, at the time, believe that plaintiff's tardiness was not acceptable is to be found in the fact that the remedies for late delivery provided in the contract were not utilized. Such defaults as occurred were cured, in the three instances in which 10-day letters were addressed to plaintiff on account of late delivery, and defendant did not find it needful to invoke other or further remedies for tardiness. Defendant deliberately withheld termination on the ground of late deliveries, because it would have been inconvenient and useless to go elsewhere; better delivery could not have been obtained from other sources.

(d) The instances of plaintiff's tardiness in meeting delivery requirements were tolerated and acquiesced in. The defendant is thereby deemed to have waived the late deliveries.

33. At all relevant times, the plaintiff was ready, willing and able to perform under the contracts. In particular, during the period of the 1969–70 contract, plaintiff's Clearfield plant, established to handle expected business from the Depot, was idle for substantial periods, and had a great deal of unused capacity.

34. The Government breached the contract and is liable for damages according to law.

35. The damages are to be computed in accordance with the termination-for-convenience clauses in the contracts. Profits lost to the contractor—that is anticipatory profits—are not recoverable under such convenience-termination clauses.

36(a). In the 5-month period of March–July 1968, towards the end of the period of the first, 1967–68, contract, the dollar volume of the Depot's purchases through GSA of boxes required by the contract to be purchased from plaintiff, was $42,218.34. While the record does not contain comparable figures for the remainder of the period of the first contract, it is reasonable to extrapolate these figures backwards over the prior 7 months, to arrive at a total for the 12 months of $101,324.04 as the amount of the Depot's purchases elsewhere of boxes covered by the contract with plaintiff.

(b) In the period of the second, 1968–69, contract the

dollar volume of the Depot's purchases through GSA of boxes required by the contract to be purchased from plaintiff was $45,409.50.

(c) The claim by plaintiff to a 10 percent profit on the business lost to it by reason of defendant's breach, amounting to $10,132.40 on the first contract and $4,540.95 on the second contract, would be reasonable were anticipatory profits recoverable under a convenience-termination clause.

37(a). There is no evidence in the record of the expenses or costs of the Ontario plant in the period of the first two contracts or of any other costs, payments or profits during that period allowable under the convenience-termination clauses in those contracts.

(b) Accordingly, plaintiff has not proved any recoverable damages for the breach of the 1967–68 and 1968–69 contracts.

38(a). (1) In the period of the third, 1969–70, contract, the dollar volume of the Depot's purchases through GSA required by the contract to be purchased from plaintiff was $466,720.98.

(2) This sum should be reduced by $16,797.41 to $449,923.57 on account of the Depot purchases below the minimum orders under the third contract, and thus not required to be purchased from plaintiff.

(3) The reduced sum of $449,923.57 should further be reduced by 15 percent to $382,435.03, on account of freight charges, which under the third contract were to be borne by plaintiff, leaving the sum of $382,435.03 as the dollar volume of the business lost to plaintiff by reason of defendant's breach of the third contract.

(b) Plaintiff's claim to a 10 percent profit on this business, lost to it by reason of defendant's breach, or $38,243.50, would be reasonable were anticipatory profits recoverable under the convenience-termination clause.

39. There is no evidence in the record of any costs, expenses and payments during the period of the third, 1969–70, contract allowable under the convenience-termination clause in the contract, other than the plaintiff's operating losses at its branch plant at Clearfield, Utah.

40. Plaintiff established the branch plant in Clearfield, induced to do so by direct encouragement of responsible

Depot personnel and on the basis of its rightful expectation of performance of the third, 1969–70, contract. While plaintiff hoped to get some non-Government business, it expected the Depot's business to carry the plant in the 1-year period of the contract. The Clearfield plant may therefore be treated, for purposes of the termination-for-convenience clause, as established in preparation for the performance of the third contract. Since the plant closed in less than 6 months, for lack of orders, the loss suffered at the plant may, therefore, be treated as initial costs and costs preparatory to performance, allowable under the governing convenience-termination clause, the April 1966 edition set out in 8 CFR § 8.701(a) (1969).

41. In fact, for lack of Government orders, the Clearfield plant remained totally or partly idle for substantial periods and it was shut down, in March 1970, with an operating loss as follows:

Material	$40, 792. 03	
Direct Labor	13, 004. 63	
Administrative Expense (as corrected; see defendant's pretrial submission) (Managerial salaries, clerical salaries, office equipment rental $500)	17, 048. 00	
Rent	3, 250. 00	
Salaries	1, 834. 80	
Taxes and Licenses	149. 65	
Utilities	500. 00	
Repair and Maintenance	1, 140. 50	
Depreciation	1, 333. 28	
Plant Supplies	496. 60	
Equipment Rental	300. 00	
Gasoline and Oil	1, 629. 92	
Truck Rental	500. 00	
Travel and Entertainment	2, 357. 24	
Telephone and Telegraph	847. 17	
Stationary and Supplies	228. 22	
Postage	60. 00	
Subscription and Dues	19. 33	
Professional Fees	81. 38	
Interest	2, 021. 98	
Business Debts—Bad Debts	834. 41	
Miscellaneous	753. 49	
		$89, 182. 63
Gross Income		54, 350. 91
Operating Loss		$34, 831. 72

42(a). There being no better evidence of preparatory costs in the record, the operating loss of $34,831.72 is in the circumstances a reasonable equivalent of the unreimbursed preparatory costs for the performance of the contract allowable under the termination-for-convenience clause. These circumstances include the following:

(1) Plaintiff was in part induced by the Depot to establish the plant to perform the Depot's work, and in part by its expectation of the business.

(2) Plaintiff expected that the Depot business would carry the plant in its first year; had the Depot met its obligations, the expectation would have been realized. Had the $466,000 or $382,000 of orders that went to GSA been given to plaintiff, as the contract required, the profit at 10 percent would have more than defrayed the plant's operating expenses, kept the plant in operation and avoided the loss. This is not said by way of supporting an award to plaintiff of its lost profits, but rather to confirm the reasonableness of treating the costs of the plant lost to plaintiff as an expense incurred in the preparation for the performance of the contract.

(3) The plant was actually established to perform the contract, went idle and was shut down with a loss in the amount stated, for lack of Depot orders.

(b)(1) No doubt is cast on the conclusion in the foregoing subparagraph (a) by reason of the circumstances that plaintiff filled at its Ontario plant $70,000 of the $106,000 in orders received after the Clearfield plant became operational. Finding 21. Work for both plants was doubtless the expectation; had the Depot met its obligations work for both plants would have been provided; and when orders did not come, it could not be expected that plaintiff would deprive its parent headquarters plant of what work there was.

(2) Nor is the conclusion made doubtful by the fact that plaintiff did approximately $19,000 worth of non-Government business at the Clearfield plant. The plant was established to perform the contract with the Government and plaintiff expected that the Government's business would carry the plant.

Syllabus

(3) Such items as the cost of "interest" and "entertainment" in foregoing finding 41, ordinarily not allowable in convenience-termination proceedings, will not be deducted from the loss to be allowed because (a) they were incurred, and were verified in the Government's audit, (b) no objection has been made, (c) interest may be allowable in proper circumstances, where a loan was devoted entirely to performance of the contract, as in the findings in *Manloading & Management Associates, Inc.* v. *United States*, 203 Ct. Cl. 725 (1973), (d) entertainment may have been proper, as a cost of non-Government business which lessened the plant's loss, and, finally, (e) because the items of cost listed in finding 41 are not being allowed for their intrinsic nature, as such, but as elements in an overall operating loss at the plant, established in preparation for performance of the contract.

43. In these circumstances, the sum of $34,831.72 is therefore a reasonable amount, in the nature of a jury verdict, to be assessed against defendant as the damages for its breach of the 1969–70 contract with plaintiff.

CONCLUSION OF LAW

Upon the foregoing findings of fact and opinion, which are adopted by the court and made a part of the judgment herein, the court concludes as a matter of law that plaintiff is entitled to recover of and from the United States and judgment is therefore entered for plaintiff in the amount of thirty-four thousand eight hundred thirty-one dollars and seventy-two cents ($34,831.72).

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512 F. 2d 1065

JACOBSON BROTHERS, INC., ELISA E. JACOBSON, SOFUS T. JACOBSON AND ISIDOR R. JACOBSON v. THE UNITED STATES

[No. 355–70. Decided March 19, 1975]

ON THE PROOFS

Patents; patentability; obviousness.—Plaintiffs seek reasonable and entire compensation for the alleged unauthorized use and manufacture by or for the United States of an invention described in

Syllabus

claim 1 and dependent claims 2, 4, 6 and 7 of United States Patent No. 3,014,984. The patented device is an underwater salvage vehicle using a television camera as an "eye" to permit the operator on the surface vessel to control movements of the vehicle by selectively operating winches on which cables, which are attached to four ocean-floor maneuvering anchors, are wound in or payed out. Specifically, plaintiff maintains that three television-equipped torpedo recovery vehicles procured by the Navy infringe said claims. Defendant denies infringement and asserts, *inter alia*, that the patent is invalid for obviousness under 35 U.S.C. § 103. After a review of the state of the art at the time the alleged invention was made, of the efforts of the Navy in developing its own project, the problems in providing stability and maneuverability for an underwater salvage device, it is *held* that the differences between claim 1 and the prior art are such that the subject matter, when viewed as a whole in the light of all circumstances, would have been obvious to one of ordinary skill in the art. The remaining claims cannot be sustained in view of the prior art. Plaintiffs are not entitled to recover and the petition is dismissed.

Patents; infringement; substitution of equivalents; generally.

[1] Infringement is not avoided by substituting for an element in a claimed device another element which is its full equivalent.

Patents ⇐ 245(1)

Patents; patentability; obviousness; generally.

[2] In resolving the issue of obviousness under 35 U.S.C. § 103, the scope and content of the prior art are to be determined, differences between the prior art and the claims at issue are to be ascertained, and the level of ordinary skill in the pertinent art resolved.

Patents ⇐ 18

Patents; patentability; obviousness; generally.

[3] The determination of the issue of nonobviousness must be made from an assessment of the subject matter at the time the invention was made.

Patents ⇐ 18

Patents; claims; define invention.

[4] Claims are the measure of the invention and the obviousness issue must be resolved on the basis of what is claimed.

Patents ⇐ 18

Patents; patentability; generally.

[5] Inquiry into the obviousness of claimed subject matter must focus on the differences between it and the prior art disclosures, but in context of the claimed subject matter as a whole. It is the selection and employment of old elements in the claimed combination that must be scrutinized from the standpoint of obviousness.

Patents ⇐ 18

Per Curiam

Patents; patentability; skill in the art.

[6] In determining whether differences between the claimed subject matter and the prior art disclosures are sufficient to satisfy the requirement of nonobviousness contemplated by 35 U.S.C. § 103, with reference to a person having ordinary skill in the art, factors aiding in developing a picture of what is the level of skill of such person are: the various prior art approaches employed, the types of problems encountered in the art, the rapidity with which innovations are made, the sophistication of the technology involved and the educational background of those actively working in the field.

Patents ⟸ 17(1)

Patents; patentability; commercial success.

[7] Secondary considerations such as commercial success and the failure of others are invaluable as real-life indicia not only of the level of skill in the art but in the ultimate determination of validity.

Patents ⟸ 36.2(1)

Patents; grant; extent of grant.

[8] On the issue of patentability there is a substantial public interest. It is the longstanding public policy that everyone is to be free to practice an invention which is in the public domain, and only those patents which meet the statutory, and constitutional, standards of patentability are to be sustained. In the application of those standards, the United States stands in the same position, no better and no worse, as any private defendant in a patent infringement suit.

United States ⟸ 97

Patents; patentability; commercial success.

[9] To be of value on the issue of obviousness, commercial success must be shown to be attributable to the patentee's claimed contribution.

Patents ⟸ 18

Robert C. Miller, attorney of record, for plaintiffs.

Louise O'Neil, with whom was *Assistant Attorney General Carla A. Hills*, for defendant.

Before KASHIWA, KUNZIG, and BENNETT, *Judges*.

PER CURIAM: This case comes before the court on defendant's motion, filed December 31, 1974, requesting that the court adopt the recommended decision of Trial Judge Hal D. Cooper, filed November 6, 1974, pursuant to Rule 134(h), as the basis for its judgment in this case since plaintiffs have failed to file a notice of intention to except thereto and the time for so filing pursuant to the Rules of the court has expired. Upon consideration thereof, without oral argument,

since the court agrees with the recommended decision, as hereinafter set forth*, it hereby grants defendant's motion and affirms and adopts the said decision as the basis for its judgment in this case. It is therefore concluded that plaintiffs are not entitled to recover and the petition is dismissed.

OPINION OF TRIAL JUDGE

COOPER, *Trial Judge:* Plaintiffs, under 28 U.S.C. § 1498, seek reasonable and entire compensation for the alleged unauthorized use and manufacture by or for the United States of an invention described in claims 1, 2, 4, 6, and 7 of United States Letters Patent No. 3,014,984, entitled "Underwater Television Device," issued on December 26, 1961, to Irenus C. Jacobson, now deceased.[1]

Plaintiff Jacobson Brothers, Inc., a Washington State corporation with its principal place of business in Seattle, Washington, is the licensee of the patent in suit. This corporation is owned by I. C. Jacobson, Alan Jacobson, Robert Brog, and Bryan Jacobson. The plaintiffs Elisa E. Jacobson (executrix of the estate of I. C. Jacobson), Sofus T. Jacobson, and Isidor R. Jacobson are the owners of the patent in suit.[2]

The patent in suit relates to an underwater salvage device. It consists of a closed circuit television camera mounted in a pressure resistant watertight chamber, the chamber being adjustably mounted on a cage or framework to permit pan and tilt movement. A plurality of illuminating lights are mounted on the framework in association with the camera and are adapted to be moved with the camera. A hoisting cable is used to suspend the entire device from a surface vessel and to raise and lower it in the water. In addition, a maneuvering system is provided to maneuver the device along the ocean floor. This system includes four maneuvering

*Whereas the court adopts the trial judge's separate findings of fact, which are set forth in his report filed November 6, 1974, they are not printed herein since such facts as are necessary to the decision are contained in his opinion.

[1] Plaintiffs' claim to recover compensation under 28 U.S.C. § 1491 for damages sustained as a result of an alleged breach of an implied contract relating to the subject matter of the patent in suit was dismissed, with prejudice, by stipulation of the parties.

[2] By agreement of the parties, the only issues before the court are the validity and infringement of the patent in suit with the issue of accounting, if any, deferred to later proceedings.

anchors with a cable attached to each anchor. Each cable passes through a separate block or pulley on the framework, up to the surface vessel, where it is attached to a cable-winding drum or winch to enable each cable individually to be wound in or payed out. In essence, the patented device is an underwater vehicle using a TV camera as an "eye" to permit the operator on the surface vessel to control the movements of the vehicle by selectively operating the winches.

Although not described in the text of the patent, the patented device has been used primarily to recover torpedoes for the U.S. Navy. In so doing, the surface vessel is first fixed in a three-point moor to minimize horizontal movement. The four maneuvering lines with anchors attached are then deployed some 300 to 400 yards from the ship, roughly 90° apart. The device is suspended over the side of the main vessel with a boom and hoist cable, and the four maneuvering lines are attached to the frame by passing them through the pulleys. The device is lowered over the side by paying out the hoist cable and the four maneuvering lines simultaneously until it is just short of the bottom. It is maneuvered by selectively taking in and paying out the appropriate maneuvering lines until, through a monitor on board the vessel, visual contact with the torpedo is made. The operator maneuvers the vehicle over the torpedo and actuates a clamp which grips the torpedo. The torpedo is then lifted to the surface.

Plaintiff maintains that three television-equipped torpedo recovery vehicles procured by the Navy, named the Solaris, SORD I, and SORD II, infringe claims 1, 2, 4, 6, and 7 of the patent. Claim 1 is as follows:[3]

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[3] Claims 2, 4, 6, and 7, dependent on claim 1, provide:

"2. An underwater television device as in claim 1 including a first means for tilting said camera in a vertical plane and a second means for moving said camera in a horizontal plane.

* * * * *

"4. An underwater television device as in claim 1 including means secured to said cage for grasping an object.

* * * * *

"6. An underwater television device as in claim 1 wherein the cage maneuvering lines are three or more.

"7. An underwater television device as in claim 1 wherein the illuminating means comprises a plurality of electric lamps and said camera is mounted in a water-tight case and the electric lamps are mounted about the case and directed to illuminate the area in the view of the camera."

> An underwater television device comprising a cage structure, a supporting cable for raising and lowering said cage, a television camera adjustably mounted within said cage, illuminating means mounted in association with said camera and adapted to be moved in accordance with the movement of said camera, a plurality of cage maneuvering lines, an anchor secured to the outer end of each line, a cable winding drum for each maneuvering line on which the maneuvering line is adapted to be wound in or payed out, said drums being mounted on a surface vessel and block means on said cage for slidably securing the cage to said maneuvering lines intermediate the ends of said lines and each of said lines leading directly from its respective winding drum, through its respective block to its respective anchor.

Although defendant denies any infringement of the patent, there is no substance to that contention. Such differences as there are between the claims and the accused structures relate to a modified cable maneuvering system that the Navy evolved. Quite clearly, that modification is the full equivalent of the arrangement claimed and, therefore, does not avoid infringement. *Graver Tank & Manufacturing Co.* v. *Linde Air Products Co.*, 339 U.S. 605 (1950); *Tektronix, Inc.* v. *United States*, 195 Ct. Cl. 53, 445 F. 2d 323 (1971); *Autogiro Company of America* v. *United States*, 181 Ct. Cl. 55, 384 F. 2d 391 (1967), *rehearing denied*, 184 Ct. Cl. 801 (1968).

The principal issue for consideration is defendant's contention that the patent is invalid for obviousness under 35 U.S.C. § 103.[4] The approach to be taken in resolving that issue was stated in *Graham* v. *John Deere Co.*, 383 U.S. 1, 17 (1966), in the following terms:

> Under § 103, the scope and content of the prior art are to be determined; differences between the prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent art resolved. Against this background, the obviousness or nonobviousness of the subject matter is determined. * * *

See, also, Ellicott Machine Corp. v. *United States*, 186 Ct. Cl. 655, 405 F. 2d 1385 (1969).

[4] Although defendant also alleges invalidity of the claims under 35 U.S.C. § 102, it is clear that no one publication or patent discloses all of the claimed elements arranged in the manner claimed. Not being identically "disclosed or described," the defense of anticipation cannot be sustained and resort must be had to 35 U.S.C. § 103 to determine the nonobviousness of the differences.

The nonobviousness determination must, of course, be made from an assessment of the subject matter "at the time the invention was made." 35 U.S.C. § 103. Here the seeds of the invention were sown in the summer of 1955 when plaintiffs first purchased an underwater TV camera and lights for use in a potential salvage operation they had in mind. At that time, underwater TV cameras were known and had been previously suggested for underwater salvage work. In one such prior art arrangement (described in the *Wireless World* publication), a closed circuit TV camera and a bank of lights were mounted on a framework, with the camera and lights being movable as a unit. The assembly was suspended from a surface vessel by a hoist cable with the operation of the camera controlled remotely from the surface. In another prior art device (disclosed in the Hartman patent), a television camera was carried in a diving bell, along with photographic equipment, with the bell suspended from a surface vessel. The television was used to provide visual observation of the ocean floor for purposes of exploration and salvage work and the photographic equipment was used to record the objects located by the TV camera. The operation of this device was controlled remotely from the surface.

A third such device, developed by the Navy under Project Fisheye, had a TV camera, a still camera, and lights mounted on a framework, with the equipment being operated and controlled remotely from a surface vessel.

Notwithstanding the existence of these prior art arrangements, underwater television was in its infancy when plaintiffs first became interested in this field. Many of the problems they subsequently encountered, such as poor TV reception, leaking junction boxes, power and hydraulic cable problems, and shattered light lenses, stemmed from the general lack of experience by those in the business of manufacturing TV cameras and were ultimately solved by advancements made by others than plaintiffs.

The major problem encountered and solved by the patent in suit arose in May 1956 when, in an attempt to view a downed airplane in 400 feet of water, considerable difficulty was experienced in maintaining stability of the TV camera and maneuvering it into position. At that time, plaintiffs

were supporting the cage on which the camera was mounted from a hoist cable, with two maneuvering lines connected to the cage running to the fore and aft of the ship. This arrangement proved to be wholly unsatisfactory.

The prior art underwater television arrangements, discussed above, offered scant guidance in providing a suitable arrangement for maneuvering a TV camera in deep water. Only the Navy-developed device had a maneuvering capability and that was in the form of a propeller-driven propulsion system. The other prior art TV cameras were merely suspended by a hoist cable and could not be maneuvered at all.

However, the problem of providing stability and maneuverability for an underwater device was not a new one. Diving bells had been used for many years in deep-water exploration and salvage. In the 1930's, it had been proposed to use a system of cables, anchors, and winches both for maintaining stability of the bell against underwater currents and to afford maneuverability of the bell along the ocean floor. Two of these arrangements are disclosed in the O'Rourke and Romano patents. Both of these suspended the bell from a hoist cable with a plurality of maneuvering cables interconnecting the bell with anchors on the ocean floor. These anchors served as fixed points relative to which the bell could be maneuvered by operation of winches for winding up or paying out selected maneuvering cables. In O'Rourke, the winches were on the diving bell and were operated by the occupants of the bell, while Romano placed the winches on the surface vessel where they were operated as directed by the occupants in the bell.

This, then, was the state of the art when, in late 1957, Jacobson solved his stability and maneuverability problem by developing the system disclosed in his patent.

In 1958, the Navy opened a torpedo test range in Dabob Bay, near Seattle, Washington, the depth of that range being about 600 feet, a depth substantially greater than a diver could reach. Prior to that time, the Navy had tested its torpedoes at depths that were sufficiently shallow to permit divers to retrieve them. However, with the advent of deep-running torpedoes, much deeper test ranges were needed.

In 1958, plaintiffs heard a rumor of a sunken torpedo in Dabob Bay. Although they had given no thought to torpedo recovery prior to that time, they offered their services to attempt recovery of that torpedo. The Navy accepted and plaintiffs ultimately were successful in recovering the torpedo, using the device disclosed in the patent. This was the first successful recovery by anyone of a torpedo in deep water and it demonstrated that the system Jacobson had developed would hold the camera firmly against underwater currents while permitting incremental movement of the camera along the ocean floor.

The equipment disclosed in the patent in suit was used by plaintiffs in hundreds of successful torpedo recoveries for the Navy over the next few years. In these recoveries, plaintiffs worked under contract with the Navy and received numerous letters of congratulations on their work, which saved the Navy very considerable sums of money. In addition to torpedoes, plaintiffs also recovered from deep water different types of bombs and missiles.

Subsequent to their first successful torpedo recovery, plaintiffs offered to sell their equipment to the Navy. The Navy declined the offer, electing instead to embark upon a program of developing its own torpedo-recovery equipment. Under this program, the Navy tried a number of approaches, all of which were failures. Ultimately, it procured the Solaris, which employed a TV camera and a torpedo-gripping claw but which was designed to be maneuvered by propellers, much in the same manner as the earlier Navy Project Fisheye. This, too, was a complete failure, largely due to the instability of the maneuvering system. Ultimately, the propellers were removed from the Solaris and a cable-maneuvering system of the same type as that used by plaintiffs was employed. With this modification, the Solaris was successful. Thereafter, the Navy procured two more recovery vehicles, both named SORD, each of which employed a cable-maneuvering system for maneuvering the vehicle.

Against this background, defendant contends that claim 1 merely defines a combination of old elements that was obvious to anyone having ordinary skill in the art of underwater-salvage work at the time the invention was made. Plaintiffs

assert that the combination of claim 1 was unobvious to one of ordinary skill in the field of deep-water recovery of torpedoes and that the commercial success achieved by plaintiffs, together with defendant's abortive attempts at development of a different system of torpedo recovery, are cogent evidence of this nonobviousness.

It is at once apparent from the competing arguments of the parties that they are in disagreement as to what is the pertinent art. As is so often the case, plaintiffs define the art narrowly while defendant contends for a much broader definition. In resolving this issue, it is the claims that are the measure of the invention and the obviousness issue must be resolved on the basis of what is claimed. *Kemode Manufacturing Co.* v. *United States*, 171 Ct. Cl. 698, 347 F. 2d 315 (1965). In looking to the claims, it appears that plaintiffs' definition of the pertinent art is too restrictive. The claims describe the invention broadly as an "underwater television device" and that is the title of the patent. The specification refers to the invention as an underwater-scanning mechanism. Further, the operation of the device, as described in the patent, is phrased in general terms and contains no reference whatever to deep-water torpedo recovery. Thus, the claims, both by their terms and when construed in light of the specification, are not restricted to apparatus for deep-water recovery of torpedoes. Moreover, the facts are that Jacobson made his invention before the problem of deep-water recovery of torpedoes had even arisen. Accordingly, the art pertinent to an evaluation of the obviousness of these claims is not limited to that field. *Application of Sebald*, 268 F. 2d 430, 432 (CCPA 1959). Among the art that is pertinent are the O'Rourke and Romano patents, particularly with respect to their teachings of maneuvering systems for maneuvering underwater devices.

In view of the pertinent prior art, the differences defined by the subject matter of claim 1 reside principally in two areas. None of the prior art discloses a cable-maneuvering system in combination with a frame-mounted underwater TV camera and lights. Nor do the prior art cable-maneuvering systems, specifically those used with the underwater devices of O'Rourke and Romano, correspond exactly

to the arrangement of cables, pulleys, winches, and anchors specified in claim 1. It is these differences, but in the context of the claimed subject matter as a whole, upon which the inquiry into the obviousness of claim 1 must focus.[5]

The determination of whether these differences are sufficient to satisfy the requirement of nonobviousness contemplated by § 103 must be made with reference to "a person having ordinary skill in the art." A finite quantitative definition of this ordinarily skilled person is difficult at best. *Reeves Instrument Corp.* v. *Beckman Instruments, Inc.*, 444 F. 2d 263 (9th Cir. 1971), *cert. denied*, 404 U.S. 951; *Reiner* v. *I. Leon Co.*, 285 F. 2d 501 (2d Cir. 1960). Rather the various prior art approaches employed, the types of problems encountered in the art, the rapidity with which innovations are made, the sophistication of the technology involved, and the educational background of those actively working in the field are among the factors which will ofttimes aid in developing a picture of what is the level of skill of the ordinary person in an art. Considerations such as commercial success and the failure of others, characterized as "secondary" in *Graham*, are nonetheless invaluable as real-life indicia not only of the level of skill in the art but also in the ultimate determination of validity. *See, e.g., Safety Car Heating & Lighting Co.* v. *General Electric Co.*, 155 F. 2d 937, 939 (2d Cir. 1946).

In this case, there is little evidence, other than the published prior art, bearing on the level of skill in the art. The problem of maintaining stability against underwater tides and currents was long known to those working with underwater devices, having been expressly recognized and defined by O'Rourke as early as 1934. In addition, O'Rourke had disclosed to the art a cable, winch, and anchor arrangement which not only provided stability but also afforded maneuverability of the bell along the ocean floor. In 1935, Romano

[5] To focus only on the differences, without placing those differences in the context of the invention as a whole, would render almost every invention unpatentable since those differences, necessarily comprised at least in large part of old elements, could always be found in some context. It is the selection and employment of those elements in the claimed combination that must be scrutinized from the standpoint of obviousness. *B. G. Corp.* v. *Walter Kidde & Co.*, 79 F. 2d 20, 22 (2d Cir. 1935).

disclosed a somewhat different maneuvering system for a diving bell, again using cables, anchors, and winches. With the advent of television and at least by 1952,[6] underwater TV cameras and lights had been adopted as a technique for underwater scanning in salvage operations in lieu of sending a man down to survey the ocean floor.

In view of this knowledge, which must be deemed to have been possessed by those working with underwater-salvage devices, it is difficult to find anything unobvious in the selection and use of a cable, winch, pulley, and anchor system for maneuvering an underwater TV camera. Jacobson, confronted with problems of underwater currents and tides, adopted that combination for reasons of stability and maneuverability. O'Rourke, confronted with precisely the same problem, advanced the same solution for precisely the same reasons. While O'Rourke's vehicle was a manned diving bell, there is nothing in the record that suggests that a frame-mounted TV camera presented problems any different in kind or degree from those confronting O'Rourke. In the absence of such evidence, the conclusion is inescapable that one ordinarily skilled in the art would readily recognize that the cable system of O'Rourke could be used to provide stability and maneuverability for any type of underwater apparatus, including a TV camera.

In reaching that conclusion, due consideration has been given to the evidence which demonstrates, beyond question, that the cable-maneuvering system was the key to the success, both of plaintiffs' equipment and that of defendant's. Before plaintiffs adopted such a system, their TV camera could not be used satisfactorily in deep water and, quite clearly, the failure of the alternative approaches attempted by defendant confirm the importance of this system to a workable combination. But, notwithstanding its importance, the idea of a cable-maneuvering system for stability and maneuverability was an old one. Hence, while that concept may have solved the problem, it is considered to have been an obvious concept to employ in view of the prior teachings of O'Rourke. *Ellicott Machine Corp.* v. *United States*, *supra*.

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[6] One exhibit suggests that this was done as early as 1947. The Hartman patent, dated November 10, 1936, suggests even an earlier date.

There being nothing unobvious, in light of O'Rourke, in using a cable-maneuvering system for controlling an underwater television device, there remains the question of whether the particular maneuvering system described in claim 1 is unobvious. When compared with O'Rourke, the difference between the two systems dissolves largely to a matter of where the winches are placed. O'Rourke had the winches on the diving bell with the cables running out to the anchors, while Jacobson placed the winches on the surface vessel and ran the cables through pulleys out to the anchors.

The position of the winches appears to be largely a matter of choice, particularly in view of Romano who suggested placing the winches on a surface vessel. Since the Jacobson device, unlike O'Rourke, is not manned, there would seem to have been no reason even to consider placing the winches on the underwater device. Indeed, this would have created an additional problem, that of how to control the winches from the surface.

Irrespective of where the winches are located, both the patented arrangement and O'Rourke use a maneuvering system based on the principle of maneuvering cables secured to angularly spaced anchors, which serve as fixed points, with maneuvering of the underwater vehicle being accomplished by selective winding up and paying out of the cables so that the vehicle is maneuvered relative to those fixed points. The winches only provide the mechanism for winding up and paying out the cable. Merely moving the winches of O'Rourke to the surface vessel would necessarily result in the cables passing from the anchors, through pulleys on the underwater vehicle, to the winches, all as set forth in the claim. There is nothing in either Romano or O'Rourke that would suggest any problem in placing the winches on the surface vessel; nor is there any evidence in the record suggesting that by so doing, either a longstanding problem was solved or that this was the key to the development of a successful maneuvering system. It simply appears to have been a convenient, and indeed the most logical, place to position the winches when the underwater device is unmanned.

Plaintiffs, with justifiable pride, point out that the Jacobson apparatus was the first device to recover torpedoes

in deep water. It is also undoubtedly true that, due to their equipment, developed on their own initiative and with their own funds, the public has been benefited by the saving of substantial sums.[7] For this, they are to be commended and their contribution to the public good should not, in any way, be minimized. But the issue before the court is one of patentability and, on that issue, there is a very substantial public interest as well. *Lear, Inc.* v. *Adkins*, 395 U.S. 653 (1969). It is the longstanding public policy of this country that everyone is to be free to practice that which is in the public domain, *Anderson's-Black Rock, Inc.* v. *Pavement Salvage Co.*, 396 U.S. 57 (1969); *Scott Paper Co.* v. *Marcalus Mfg. Co.*, 326 U.S. 249 (1945), and only those patents which meet the statutory, and constitutional, standards of patentability are to be sustained. *Graham* v. *John Deere Co.*, *supra*. In the application of those standards, the United States stands in the same position, no better and no worse, as any private defendant in a patent infringement suit. See, *e.g.*, *United States* v. *Adams*, 383 U.S. 39 (1966). For this reason, the benefits derived from plaintiffs' achievement, except and to the extent they illumine the issue of obviousness of the claimed subject matter, are not a sufficient reason to sustain the claim as against the defendant here. *Ellicott Machinery Corp.* v. *United States*, *supra; Martin-Marietta Corp.* v. *United States*, 179 Ct. Cl. 70, 373 F. 2d 972 (1967); *Hanks* v. *Ross*, 200 F. Supp. 605 (D. Md. 1961).

Nor is the apparent obviousness of the claimed arrangement altered by the commercial success enjoyed by Jacobson's apparatus. Although it has been said previously, it bears repeating that the invention was made prior to the time when the problem of recovering torpedoes in deep water arose and, hence, it was not a response to a long-felt need in that field. At the time the invention was made, Jacobson's contribution, over and above the teachings of O'Rourke, consisted of his specific arrangement of cables, pulleys, and winches in an underwater-salvage device. Since, to be of value on the issue of obviousness, the commercial success must be shown to be

[7] Of course, through their many contracts with the Navy, plaintiffs have been compensated for all of the torpedo-recovery work they performed.

attributable to the patentee's claimed contribution, *Palmer* v. *United States*, 182 Ct. Cl. 896 (1968), it was incumbent on plaintiffs to show that it was Jacobson's arrangement of the winches, cables, and pulleys, at least in substantial part, that made his device a success in the recovery of torpedoes. This they have failed to do. In the absence of some evidence of this character, there is as much reason to accord the commercial success to the teachings of O'Rourke incorporated in the Jacobson device as there is to attribute it to Jacobson's contribution.[8]

In summary, it is concluded that the differences between claim 1 and the prior art are such that the subject matter, when viewed as a whole in the light of all circumstances, would have been obvious to one of ordinary skill in the art.

Claims 2 and 7 add details regarding the mounting of the camera and lights and do not lend anything of patentable significance to the claimed combination. Providing an adjustable mounting for the camera so that it is capable of pan and tilt movements must, as a broad concept, be considered an obvious expedient.

Claim 6 merely specifies that at least three maneuvering lines are employed. O'Rourke discloses the use of three cables and Romano suggests that three or four lines be used.

Claim 4 adds the limitation of a grasping mechanism for grasping an object. This too is a well-known expedient, being disclosed in Romano who employed mechanical arms on the diving bell for the purpose of grasping and lifting objects. Adding a grasping mechanism to the combination of claim 1 would have been an obvious technique for picking up objects from the ocean floor.

Having concluded that claims 1, 2, 4, 6, and 7 cannot be sustained in view of the prior art, it follows that the petition must be dismissed.

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[8] The evidence regarding the Navy's failures does not supply the missing link since it appears that the Navy's efforts were largely directed toward developing recovery apparatus that did not employ the rather time-consuming and laborious cable-maneuvering approach. The modified cable-maneuvering system they ultimately adopted indicates that it was the principle, not Jacobson's specific arrangement, that was critical to a successful device.

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CONCLUSION OF LAW

Upon the findings of fact and the foregoing opinion, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiffs are not entitled to recover, and the petition is dismissed.

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513 F. 2d 588

FOSTER WHEELER CORPORATION v. THE UNITED STATES

[No. 371–72. Decided March 19, 1975]

ON PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

Contracts; disputes; faulty specifications; impossibility of performance; assumption of risk; waiver of claim.—In February 1967 plaintiff entered into a fixed-price contract with the Government acting through the Philadelphia Naval Shipyard, to design, fabricate and deliver within 13 months two marine boilers and to perform a dynamic shock analysis study demonstrating that the boilers would withstand shock to intensities prescribed in the contract specifications. Meetings and correspondence throughout the first 9 months of 1967 indicated that there were apparent conflicts between the contract shock-hardness specifications and the requirements of maintenance, repair and accessibility set forth in the basic Military Specifications. Plaintiff maintained that unless the Government compromised one or the other of the requirements, the contract specifications could not be met. In October 1967 plaintiff had revised its mathematical model three times and had conducted numerous dynamic analyses of the models with no indication that it was substantially closer to creation of a shock-hard boiler. On October 4, 1967 by agreement the Government approved plaintiff's *non*shock-hard design and permitted the dynamic analysis of that design to be completed concurrently. During this period plaintiff requested and received several extensions of delivery time. In December 1967 plaintiff submitted its intended final mathematical model and dynamic design analysis, but defendant in April 1968 informed plaintiff that further work was necessary. This additional work represented a substantial change from the Government's position as established by said agreement. Thereupon plaintiff requested the contracting officer to grant an equitable adjustment for increased costs of performance, stating that the contract had become a developmental one. Plaintiff's request was denied, the contracting officer asserting that all costs were incurred in attempting to meet

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the original specifications and that there was no compensatory "change." Plaintiff alleged before the contract appeals board impossibility of performance due to conflict in original specifications, but the board found that the record did not establish such impossibility. Plaintiff asserts before this court that the design of a boiler to be shock-hard by means of dynamic shock analysis is both commercially and absolutely impossible. It is *held* (1) that the the contract was impossible to perform, either commercially or within the state of the art; (2) that the board's decision to the contrary was not supported by substantial evidence, in view of evidence showing (a) that the Government ultimately accepted plaintiff's boiler design, though it knew the boiler was not shock-hard, (b) that no other boiler manufacturer had succeeded in designing a shock-hard boiler, (c) that the Government changed its specifications relating to shock-hardness, and (d) that an *ad hoc* committee of experts concluded that the fabrication of a shock-hard boiler was beyond the state of the art in 1966; (3) that plaintiff did not assume the risk of impossibility of performance since, although it had previous boiler fabrication experience, the evidence establishes that application of the dynamic shock analysis method in an attempt to achieve an entire, shock-hard boiler was a "first" for plaintiff, and that the Government knew more about the method and had greater expertise than plaintiff; furthermore, the Government took the initiative in drafting the specifications and promoting a particular method of boiler design and fabrication as well as detailed performance specifications, including specifications limiting external and internal dimensions and requirements of access to the various components for inspection and maintenance; (4) that the factual circumstances are not amenable to a finding of mutual mistake of fact; and (5) that plaintiff did not waive its right to recover additional costs by its failure to reserve a claim for such costs at the time of the agreement of October 4. Plaintiff is entitled to recover. Plaintiff's motion for summary judgment is granted, defendant's cross-motion is denied and the case is remanded to the Armed Services Board of Contract Appeals for determination of the amount of recovery.

Contracts; disputes; administrative findings; finality of; mixed questions of law and facts; impossibility of performance.

[1] An administrative finding that performance of a contract was not impossible was a conclusion of mixed fact and law, and to the extent that the finding was based on matters of fact, it is entitled to finality in this court if supported by substantial evidence.

United States ⇐ 73(15)

Contracts; disputes; administrative decision; substantial evidence; generally.

[2] Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. This test requires consideration, on judicial review of an administrative de-

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cision, of the whole record, including both favorable and unfavorable evidence.

Administrative Law and Procedure ⇐ 791

Contracts; disputes; administrative decision; finality of on question of law.

[3] To the extent that the decision of an administrative board on the issue of impossibility of contract performance was one of law, this court is free to arrive at its own conclusions.

United States ⇐ 73(15)

Contracts; performance; impossibility; legal impossibility.

[4] The legal use of the term "impossibility" as applied to contract performance includes more than *absolute* impossibility. Impossibility includes impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved. If a contractor proves impracticability, i.e. "commercial impossibility," of a contract, he is entitled to recover his costs of attempting to perform the contract, provided he did not assume the risk of impossibility.

Contracts ⇐ 309(1)

Contracts; changes; equitable adjustment; defective specifications; costs of attempted compliance.

[5] If contract specifications are *absolutely* impossible of performance (in the sense of requiring performance beyond the state of the art), then provided the contractor did not assume the risk of impossibility he is entitled to recover his costs of attempted compliance. Such recovery may be had pursuant to the standard Changes clause of his contract.

United States ⇐ 70(22)

Contracts; performance; impossibility of performance; other contractors unable to perform.

[6] In a contract dispute in which a Government contractor asserts impossibility of performance, the fact that no other manufacturer succeeded where plaintiff failed is not only probative of the conclusion that plaintiff's failure to produce the item was not the result of incompetence of its technicians or engineers, but also suggests strongly that the contract was impossible of performance.

United States ⇐ 74(11)

Contracts; performance; impossibility of performance; alternate design.

[7] The acceptance by the Government of plaintiff's *non*shock-hard boiler design after plaintiff spent months trying to design a dynamically shock-hard boiler and to reconcile the conflict between the contract shock specifications and the requirement for easy maintenance, repair and accessibility, while not in itself representing an admission of impossibility by the Government, is a clear indication that the latter viewed its previous requirements as inadvisable.

United States ⇐ 73(17)

Contracts; disputes; administrative findings; finality of finding; mixed questions of law and fact; assumption of risk.

[8] Assumption of risk is a mixed question of fact and law, fact as to the statements and actions of the parties, but law as to the significance of those statements and actions, particularly the interpretation of contract language.

United States ⇐ 73(15)

Contracts; performance; impossibility of performance; assumption of risk.

[9] Important factors to be considered in determining the legal issue of assumption of risk of impossibility of contract performance are: (1) which party had the greater expertise in the subject matter of the contract and (2) which party took the initiative in drafting specifications and promoting a particular method of design.

Contracts ⇐ 309(1)

Contracts; waiver; claim to recovery of additional costs.

[10] Where the Government agreed to modify the requirements of the subject fixed-price contract and authorized plaintiff to fabricate the item, since such agreement did not mark an increase of costs but rather terminated those costs which were recoverable because incurred in the attempt to achieve impossible requirements, plaintiff did not waive its claim to additional costs in failing to reserve expressly such a claim at the time of said agreement.

United States ⇐ 70(36)

Eugene Schaffel, attorney of record, for plaintiff. *Thomas W. Moore, III*, *Jarvis, Pilz, Buckley & Treacy*, of counsel.

Raymond B. Benzinger, with whom was *Assistant Attorney General Carla A. Hills*, for defendant.

Before DAVIS, KASHIWA, and KUNZIG, *Judges*.

PER CURIAM: This case comes before the court on defendant's request, filed August 26, 1974, for review by the court of the recommended decision, filed June 5, 1974, by Trial Judge Charlotte P. Murphy, pursuant to Rule 166(c) on plaintiff's motion for summary judgment under Rule 163(b) and defendant's cross-motion for summary judgment. The case has been submitted on the briefs and oral argument of counsel. Upon consideration thereof, since the court agrees with the trial judge's recommended decision, as hereinafter set forth, it hereby affirms and adopts the same as the basis for its judgment in this case. Therefore, it is concluded that

plaintiff is entitled to recover and plaintiff's motion for summary judgment is granted and defendant's cross-motion is denied. The case is remanded to the Armed Services Board of Contract Appeals pursuant to Rules 149 and 150 of this court for determination of the amount of plaintiff's recovery with plaintiff's attorney directed to give advice by letter to the trial judge of the status of the remand proceedings at intervals of 90 days or less from the date of this opinion.

OPINION OF TRIAL JUDGE

MURPHY, *Trial Judge:* Plaintiff, Foster Wheeler Corporation (FWC), seeks by motion for summary judgment [1] to nullify an adverse decision by the Armed Services Board of Contract Appeals [2] denying plaintiff an equitable adjustment for costs incurred in attempting to comply with allegedly impossible contract obligations. By agreement of the parties, the issue before the Board was limited to liability; hence a decision favorable to plaintiff, as reached herein, requires that the Board conduct a second proceeding to determine the amount of plaintiff's recovery.

On February 21, 1966, defendant, acting through the Philadelphia Naval Shipyard, awarded to FWC a fixed-price, supply contract [3] for marine equipment and related written materials. Insofar as is relevant to the present dispute, plaintiff bound itself to design, fabricate, and deliver within 13 months [4] two "main boilers," referred to as AGC–19 boilers, and to perform a "dynamic shock analysis" study which would demonstrate that the AGC–19 boilers would withstand shock to intensities (G-forces) prescribed in the contract specifications. The contract price for the boilers was $271,970.00, and for the dynamic shock analysis, $8,500.00.

"Dynamic shock analysis" or the "dynamic design-analysis method" (DDAM) was developed in an effort to decrease the

[1] Pursuant to the Wunderlich Act, 41 U.S.C. §§ 321–322. Plaintiff's petition to the court also stated an alternative claim for breach of contract. Plaintiff agreed to hold this alternative claim in abeyance and proceed upon it only if unsuccessful in the present action. In view of the result reached herein, the claim for breach need not be considered.

[2] *Foster Wheeler Corporation*, ASBCA No. 13721, 72–2 BCA ¶ 9484.

[3] Contract No. N00151–23972A(X).

[4] The invitation for bids stated that delivery was required within 15 months and desired within 13 months. Plaintiff agreed to deliver the boilers within 13 months.

vulnerability of Naval ships to effects of shock. DDAM involves the creation of a mathematical model to represent a piece of equipment, use of dynamic inputs which substitute for physical stresses, and failure criteria. DDAM is thus a computer simulation intended to predict the shock-hardness of the particular piece of equipment.

Many of the events of the contract performance period must necessarily be reviewed in detail to convey the circumstances which impelled plaintiff to request an equitable adjustment from the contracting officer, and ultimately to seek relief in this court.

For the reasons set out hereafter, we conclude that the AGC–19 contract was impossible to perform, that the Government must bear the risk of impossibility, and that plaintiff has not waived its claim. Consequently, plaintiff is entitled to recover an equitable adjustment, pursuant to the changes clause, of costs incurred in attempting to meet faulty specifications.

I

The following are the background facts from which the legal issues arise. They are as found by the Board or are otherwise undisputed.

After the contract was awarded in February 1966, plaintiff submitted preliminary design plans on March 4 and May 19, and performed in-house tests of its preliminary design plan on August 12. As a result of these tests, plaintiff realized that substantial modification of its existing, *non*shock-hard boiler design was imperative if shock-hardness was to be achieved. Plaintiff requested, on October 3, an extension of the delivery date from March 21 to June 30, 1967. This was the first of many time extension requests by plaintiff, to which the Government invariably consented, either expressly or by conduct.[5]

Plaintiff submitted a proposed mathematical model on November 1, 1966. A conference was held on January 6, 1967, to air the Government's criticisms and suggestions pertaining

[5] Plaintiff's entitlement to extensions of the delivery date is not an issue herein. The Government did not argue that failure to meet the original delivery date constituted a breach by plaintiff, nor could it in view of its acquiescence in the extensions.

to the model. More importantly, at the meeting plaintiff outlined proposed changes in boiler design which plaintiff felt necessary to meet the shock-hard requirements. In a follow-up letter of January 11, 1967, plaintiff described in some detail the design changes which it felt essential to relieve the overstressed areas. In the letter, and in the meetings and correspondence throughout the first 9 months of 1967, there was continual reference to apparent conflicts between the shock specifications on the one hand,[6] and requirements of maintenance, repair, and accessibility on the other.[7] Meetings of February 9, April 4, and June 29 provided forums for discussion of the conflicts, but the Government balked at approving plaintiff's recommended design modifications because, as plaintiff had indicated, they would have restricted accessibility to the boiler components for repair and replacement. FWC maintained, however, that unless the Government compromised either its shock-hardness or maintenance requirements, the contract specifications could not be met.

As a result of a September 27, 1967 letter from Gibbs & Cox, the Government's Design Agent,[8] to the Navy, which letter emphasized that significant parts of FWC's boiler remained overstressed, an October 4, 1967 conference was held. At that conference, the Government agreed to accept plaintiff's boiler design as then conceived and to permit the dynamic analysis of that design to be completed concurrently. FWC was to recommend methods for reduction of stresses due to shock loading for "future generation" boilers. The agreement thus entailed two concessions by the Government: approval of a nonshock-hard design, and a release for fabri-

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[6] Shock specifications were contained in Appendices A and B to the contract.

[7] MIL–B–18381B (SHIPS) Requirement 3.2 stated (in part):

"* * * Reliability in service and accessibility of all parts for repair, replacement, and cleaning by ship's forces shall be paramount. * * *"

MIL–B–18381B (SHIPS) Requirement 3.7.4 prescribed:

"3.7.4 All generating tubes between the superheater and economizer shall be removable and replaceable without cutting of any structural members. All generating tubes except screen and furnace wall tubes shall be removable and replaceable from the side of the boiler without removing the superheater tubes. Screen, rear and side wall tubes shall be removable and replaceable through boiler access openings without the necessity of cutting boiler casings."

[8] As Design Agent, Gibbs & Cox acted as agent for the Government in evaluating and criticizing FWC's DDAM work, and in making recommendations to the Government. Actions of Gibbs & Cox are treated herein as actions of the Government.

cation of the boilers prior to completion and approval of the DDAM item.

The Government's concessions followed efforts by the plaintiff far in excess of what the latter had anticipated in taking on the project. In its proposal in response to the Government's bid invitation, plaintiff summarized its anticipated DDAM study of the AGC–19 boiler in the following manner:

> Determine three shock models and sets of spring constants. Run models on computer including *one rerun after first round of design modification.* Interpret results in terms of shock stresses, combining with pressure stresses in some instances. Recommend practical improvements in the boiler. Perform vibration analysis on longest tubes and steam drum internals. Write report. [Emphasis supplied.]

The summary indicates that plaintiff had planned to create three models or representations (each involving different assumptions) of an actual, existing boiler design, and then to perform a dynamic analysis on each model. The results of the dynamic analyses were expected to provide insight as to design modifications necessary to render the boilers shock-hard. Once the modifications had been made, plaintiff would repeat the computer analysis once more.

As it happened, however, by the time of the October 4 conference, plaintiff had already revised its mathematical model three times and conducted multiple dynamic analyses of these models. Yet there was no indication that plaintiff was substantially closer to creation of a shock-hard boiler than it had been in January of that year.

Plaintiff submitted its intended final mathematical model and DDAM report on December 19, 1967. The Government, however, by letter of April 15, 1968, informed FWC that further work was to be done. This demand represented a substantial change in the Government's position as established by the October 4, 1967 agreement. The status of Government concessions under the agreement, what the Government had in fact conceded by that agreement, and what the Government still expected plaintiff to be able to accomplish was thus rendered unclear.

It was at this point, specifically May 17, 1968, that plaintiff wrote to the contracting officer to request an equitable adjustment in the amount of $192,481.11. The letter was not couched in specific terms of "impossibility," nor did it speak of any specific change for which an equitable adjustment was claimed under the "Changes" clause[9] of the contract. Rather FWC characterized its claim as follows:

> * * * [T]he contract, though issued as a fixed price supply type order, became developmental, and contained the indefinite characteristics usually associated with research orders of a "cost plus" type. The result was that the Government fostered this activity and received the benefit of the development work for this contract, and for future application.
>
> The presence of this developmental factor, in a fixed price contract, with its change potential on design specification, should permit the contract to be extended on delivery and to be open to cost renegotiation, and possibly open to dispute.
>
> The impact of the Dynamic "Shock" requirements has resulted in a hardship, extending delivery beyond contractual dates, and increasing the cost of performance by Foster Wheeler Corporation in the amount of $192,481.00 detailed in Attachment "B".

The contracting officer's denial of plaintiff's claim asserted that all costs were incurred in attempting to meet the original specifications, and thus there was no "change" for which compensation would be awarded.

II

Plaintiff's complaint, filed on appeal to the Armed Services Board of Contract Appeals (the Board), specifically requested an equitable adjustment, based on the "Changes" clause, in the amount of $192,481.00. The claim alleged impossibility of performance due to the conflict in specifications, and, in addition, alleged Government delays and in-

[9] The contract contained the standard "Changes" clause (Standard Form 32; June 1964 edition) which specified in part:

"* * * If any such change causes an increase or decrease in the cost of, or the time required for, the performance of any part of the work under this contract, whether changed or not changed by any such order, an equitable adjustment shall be made in the contract price or delivery schedule, or both, and the contract shall be modified in writing accordingly. * * *"

consistencies which increased the costs of performance. Plaintiff's pre- and post-hearing briefs, however, specified impossibility of performance as the sole basis of plaintiff's claim. Plaintiff indicated during the hearing that it would seek more than the $192,481.00 originally claimed, if it was found entitled to an equitable adjustment; however, the hearing dealt only with the issue of liability, so that proof of costs was not taken.

The Board [10] misinterpreted plaintiff's claim, believing it to be based on dual theories of recovery, rather than on the single theory of impossibility.[11] Thus the Board first denied recovery based on a claim it erroneously attributed to FWC—namely that:

> * * * [A]ppellant's 11 January 1967 design revision proposal and its substantial acceptance at the 4 October 1967 conference constituted a compensable major change in contract requirements. [72–2 BCA at 44,183.]

As has been stated, plaintiff is *not* claiming that new specifications increased costs of performance and hence constituted a "Change" for which an equitable adjustment should have been awarded. Instead, plaintiff claims that it should recover costs incurred in an attempt to perform the *original*, impossible specification. The latter, plaintiff's actual claim, was labeled by the Board as plaintiff's "alternative claim basis." Regardless of the label used, the Board clearly denied recovery:

> We have reviewed and considered all of the evidence of record concerning the alternative claim approach described above. We conclude that it does not establish the alleged general impossibility of performing the subject contract. * * * And it does not negate respondent's affirmative defense based on the contractor's general assumption of contractual responsibility and risk. [72–2 BCA at 44,185.]

The Board did, however, find plaintiff entitled to equitable adjustments for three specific matters which it classified as "out of scope work." In the first, the Board found the Gov-

[10] See n. 2, *supra*.

[11] The vagueness of plaintiff's original claim to the contracting officer, as described earlier, makes the Board's confusion understandable. However, this vagueness was cured by the clarified claim subsequently filed with the Board.

ernment liable for costs, to be determined in later proceedings, of a particular conflict between the shock and the maintenance and replacement requirements: the need, for shock-hardness purposes, of "tiebacks" connecting the boiler casing and sidewall, rearwall, and roof tubes.[12]

The second "out of scope" project was said to be a study of weld reinforcement which the Government ordered plaintiff to do by use of an advanced technique. The technique, the Board found, was outside the scope of the contract, and as a result, the costs were recoverable.

The third and final equitable adjustment granted by the Board was for design engineering costs "incurred after its [plaintiff's] submittal letter dated 29 May 1968 and until its final revision submittal on 10 January 1969." 72–2 BCA at 44,189. It was explained above that the Government had agreed on October 4, 1967 to accept plaintiff's then-existing nonshock-hard boiler design, but that the Government reneged on the agreement when, on April 15, 1968, it required further analysis. Plaintiff, as the Board noted, did the additional work under protest, submitting yet another "final report" on January 10, 1969. The Government then delayed final acceptance until April 15, 1969.[13]

III

Plaintiff's motion for summary judgment found fault with 17 factual statements in the Board's decision, and, in addition, disputed the particular findings that the contract was

[12] It can only be inferred from the Board's opinion that it saw some distinction between the conflict regarding "tiebacks," on the one hand, and the other areas in which FWC's proposed solutions to meet shock-hardness conflicted with the maintenance specifications, on the other. As our nullification of the Board decision implies, the court is unable to perceive any distinguishing feature of the former. Furthermore, the allowance of the "tieback" costs is inconsistent with the Board's finding that plaintiff had assumed the risk of impossibility.

[13] From the three specific equitable adjustments granted by the Board, one can infer that the Board found some degree of merit in plaintiff's claim for an equitable adjustment. Since the basis for recovery as stated by the Board has an internal inconsistency (see n. 12, *supra*), and because the court's decision, *infra*, agrees with plaintiff that there is a broader basis for recovery, we reject the Board's analysis. Nevertheless, it may prove that the bulk of plaintiff's eventual recovery in light of this decision consists of the costs of the work described by the Board as "out of scope."

not impossible to perform, and that plaintiff assumed the risk of impossibility. Some of the contested factual findings are not relevant to the issues of impossibility of performance and assumption of risk; the literal accuracy of others is not disputed by plaintiff, which rather addresses itself to its perceptions of their misleading implications. Thus, the contested findings are discussed only if they have an impact upon relevant matters.

IV

Impossibility of Performance

The Board's finding that performance of the contract was not impossible was a conclusion of mixed fact and law. *Ray D. Bolander Co.* v. *United States*, 186 Ct. Cl. 398, 405 (1968); *United Contractors* v. *United States*, 177 Ct. Cl. 151, 162 n. 5, 368 F. 2d 585, 596 n. 5 (1966). To the extent that the finding was based on matters of fact, it is entitled to finality in this court, under the Wunderlich Act, *supra*, if supported by substantial evidence. The Supreme Court has described substantial evidence as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. This test requires consideration of the whole record, including both favorable and unfavorable evidence. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 477–484 (1951); *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 229 (1938). See also *Tecon Corp.* v. *United States*, 188 Ct. Cl. 436, 451, 411 F. 2d 1271, 1280 (1969); *T. C. Bateson Constr. Co.* v. *United States*, 149 Ct. Cl. 514, 518 (1960).

To the extent that the Board's decision was one of law, this court is, of course, free to arrive at its own conclusions. *Tombigbee Constructors* v. *United States*, 190 Ct. Cl. 615, 638, 420 F. 2d 1037, 1050 (1970). The legal use of the term "impossibility" has long included more than *absolute* impossibility. We, as well as other federal courts, have followed the definition found in *Restatement of the Law*, Contracts § 454:

> * * * [I]mpossibility means not only strict impossibility but impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved.

See *Natus Corp.* v. *United States*, 178 Ct. Cl. 1, 9, 371 F. 2d 450, 456 (1967); *United States* v. *Wegematic Corp.*, 360 F. 2d 674, 676 (2d Cir. 1966); *Transatlantic Financing Corp.* v. *United States*, 363 F. 2d 312, 315 (D.C. Cir. 1966). If a contractor proves "impracticability," *i.e.*, "commercial impossibility," of a contract, it is entitled to recover its costs of attempting to perform the contract, provided that the contractor did not assume the risk of impossibility. *Tombigbee Constructors, supra;*[14] *Stock & Grove, Inc.* v. *United States*, 204 Ct. Cl. 103, 130, 493 F. 2d 629, 643 (1974). Of course, if the contract specifications are *absolutely* impossible (in the sense of requiring performance beyond the state of the art), then, with the same proviso, the contractor is entitled to recover its costs. Such recovery may be had pursuant to the standard "Changes" clause of the contract. *Hol-Gar Manufacturing Corp* v. *United States*, 175 Ct. Cl. 518, 360 F. 2d 634 (1966).

Plaintiff asserts that the design of a boiler to be shockhard by means of dynamic shock analysis is both commercially and absolutely impossible. We hold that the Board's decision to the contrary was not supported by substantial evidence and was incorrect as a matter of law. The factual evidence which we find compelling is outlined below.

A. The Government ultimately accepted plaintiff's boiler design, although it knew the boiler was not shock-hard.

There can be no dispute that the Government retreated from its requirement that the AGC–19 boilers be shock-hard. In its letter of January 11, 1967, FWC described several areas which were overstressed, and proposed modifications of design which, in some cases, admittedly violated accessibility and maintenance specifications, but were considered necessary to satisfy shock specifications.[15] The majority of these

[14] In *Tombigbee*, the contractor was required to achieve "95% compaction" of earth. Although 95 percent compaction was achieved on the first half of the job, it was achieved only "with difficulty and great cost, with the use of a variety of equipment and without possibility of meeting the construction schedule." 190 Ct. Cl. at 636, 420 F. 2d at 1049. The Government by change order alleviated the problem for the second half of the work. The Board, whose decision was upheld by this court, granted the contractor its costs of attempting the commercially impossible task of achieving 95 percent compaction of earth within the time and monetary boundaries of the contract.

[15] The minutes of a meeting on September 22, 1966 revealed that as early as that date, plaintiff indicated that its nonshock-hard design would not be

(Continued)

areas of overstress remained unrelieved throughout the contract period. The Government agreed at the October 4, 1967 conference (6 months after the original delivery date) to accept the boiler with these overstressed areas, and any doubt that the Government knew it was approving a *non*shock-hard boiler is dispelled by FWC's letters of December 19, 1967 and January 10, 1969, which were explicit on the subject.

The only Board finding of fact which might be relevant to this matter is the statement [16] that, to the extent the October 4, 1967 design release was an "arguable relaxation of the general requirement for shock-hard design," it was "bargained and generally settled by accommodation." This finding is of doubtful relevance because it was made in conjunction with the nonclaim attributed by the Board to FWC that there was an actual "change" in specifications. Nevertheless, to the extent that the finding may suggest that the October 4, 1967 agreement was an "accord and satisfaction" as to plaintiff's costs, the evidence does not bear this out. Minutes of the conference reveal no discussion of costs; plaintiff simply urged at the meeting that the shock-hard requirements be dropped, and defendant agreed to do so. There is no basis for inferring any additional agreement.

B. No other boiler manufacturer succeeded in designing a shock-hard boiler.

Defendant's own witness, Mr. George Caley, admitted in cross-examination that other boiler manufacturers had similar problems as FWC's with shock-hard requirements, and *all* of them received waivers. Defense counsel stipulated that a major competitor of FWC, Combustion Engineering, had produced a boiler with several overstressed areas which the Government waived. The Board made no comment about these common experiences.

That no other boiler manufacturer succeeded where plaintiff failed is probative of the conclusion that FWC's failure to achieve a shock-hard boiler was not the result of incom-

(Continued)
adequate to meet the contract shock requirements. Even though plaintiff and the Government thereafter attempted to work out these conflicts, in a letter of September 27, 1967 from the Government's Design Agent, Gibbs & Cox, to the Supervisor of Shipbuilding, it was noted that significant overstressed areas remained.

[16] 72-2 BCA at 44,183.

petence of its technicians or engineers.[17] It also suggests strongly that the alternative explanation, impossibility, is the correct one.

C. The Government has changed its specifications relating to shock-hardness.

The Government changed its policy by directive of May 31, 1968, so that marine equipment manufacturers would not be required to build nontestable components to be shock-hard under dynamic analysis, except *at Government expense* and *risk:*

> (1) For all non-testable components, the Navy will specify *static* design values (g levels) for equipment design. The contractor will be required to meet these levels. Design values will be based on previous analyses, test data where available, and recommendations from the appropriate technical interests.
>
> (2) For non-testable components designed by g levels and static methods, the contractor will be required to perform a *concurrent dynamic analysis* and to complete the analysis prior to shipment of equipment. Items found deficient by the analysis shall be identified to the Navy by the contractor with proposed corrective action. All design changes associated with the difference between the specified static design values and the dynamic analysis will be incorporated into equipments *at the option and expense * * * of the Navy.* Such design changes will be accomplished only when authorized by change order. [Emphasis supplied.]

The shift in policy marks a retreat from the burden placed upon plaintiff to design a dynamically shock-hard boiler. The policy change may not in itself represent an admission of impossibility by the Government, but clearly the Government viewed its previous requirements as inadvisable.

D. The Muster Committee Report supports an inference of impossibility.

In April 1967, an "Ad-Hoc Committee" was commissioned by the Naval Ship Systems Command Headquarters to study

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[17] The Board did not find otherwise, but defendant's counsel did argue the possibility in its written submissions to the court. Plaintiff's witnesses uniformly stated that FWC did its work competently and the Government's Design Agent in its letter of July 3, 1968 indicates that plaintiff did everything reasonably within its power to produce a shock-hard boiler.

"the suitability and practicability of the dynamic analysis method as a means of satisfying shock design requirements of new construction programs." The Committee, usually referred to as the Muster Committee, consisted of three representatives each from the Government shipbuilding, private aerospace, and academic communities. In its report of October 24, 1967, the Committee made comments and arrived at conclusions which are pertinent to the AGC–19 contract.

It will be recalled that plaintiff's contract specified delivery of the AGC–19 boilers within 13 months. This meant that plaintiff was to create a mathematical model, have it approved, carry out a DDAM study, have that approved, and then fabricate the boiler, all within the 13-month period. The 13-month schedule should be compared to the following excerpt from the Muster Committee Report at 39–40:

> Navships Instruction 9400.13 or a similar set of rules and guidelines is needed in dynamic design analysis; however, the *Instruction requirements are incompatible with shipbuilding contracts from a time standpoint.* In the Ship "C" specifications it is required that the model report be approved prior to the design analysis and the design analysis report must be submitted for approval two months prior to procurement release for fabrication. For this contract, SupShips 3 estimates that from *40 to 94 weeks may be required to complete the preparation, review, and approval cycle of the model and analysis reports.* Experience to date shows that this estimate is not unrealistic. *A portion of the design time for equipment must be added to the 40 to 94 weeks required for dynamic analysis approval in establishing equipment lead time.*
>
> Long lead-time items, such as shafting, shaft bearings, boilers, propulsion turbines, reduction gears, steering gear, SSTG sets, condensers, and DFT's require a release for manufacture for certain portions within a few months after the shipbuilding contract is awarded. *If 40 to 94 weeks, plus the detail design time, must elapse prior to work release, it is obvious that present ship delivery schedules cannot be met.*
>
> *As it is now written, Navships Instruction 9400.13 does not resolve the basic incompatibility between ship*

contract construction schedules and the requirement for dynamic design analysis for shock-hardening ships.[18] [Emphasis supplied.]

Undisputed testimony of plaintiff's engineer reveals that the actual fabrication of the boiler requires approximately 8 months. The minimum time required to build a shock-hard boiler, if possible at all, would thus be 40 to 94 weeks, *plus* detail design time, *plus* 8 months for fabrication.

The excerpt from the Muster Committee Report is confirmed by testimony of plaintiff's witness who demonstrated convincingly that, even if the DDAM work were approved on the first submission—an unlikely possibility—a minimum of 19 months would be needed to perform the contract.[19] More likely, the witness stated, several cycles of design, analysis, and approval would be required over an *indefinite* time period and at *unlimited* cost. Defendant's witness, Mr. Richardson of Gibbs & Cox, agreed that plaintiff's time calculations were reasonable.

The Muster Committee Report characterized "the introduction of DDAM as a general contractual requirement" as "relatively abrupt and premature." The Committee's conclusions include those which follow:

> 7. neither the Navy nor industry has provided adequate organization and management for effective prosecution of the dynamic analysis shock design program.
>
> * * * * *
>
> 8. the current specification requirements for completion of analyses prior to release for manufacture are unrealistic and unsatisfactory.
>
> * * * * *
>
> 9. Many equipment suppliers and shipbuilders are convinced that they have been expected to assume unreasonable business risks.
>
> * * * * *

[18] By letter of August 29, 1966 from the Government's Design Agent, Gibbs & Cox, Navships Instruction 9400.13, dated June 30, 1966, was called to plaintiff's attention.

[19] Mr. Eric M. Perryman, engineer and FWC contract manager.

10. there is a need for improved organization and management of the review and approval process.

E. Expert testimony weighed heavily in plaintiff's favor.

Plaintiff's two expert witnesses, Dr. Norman Abramson and Dr. Wilfred Baker, were employed by the Southwest Research Institute, a nonprofit organization which had consulted with FWC on the AGC–19 boiler. They testified that DDAM was and is evolutionary and developmental in nature, that the attempt to create a shock-hard boiler was beyond the state of the art in 1966, or even at the time of the Board hearing, and that plaintiff's work was competent.

Defendant's witnesses were not always in agreement with one another. Mr. John Richardson not only found plaintiff's time calculations to be reasonable, but also voiced his agreement with the Muster Committee conclusions. While he testified that FWC's mathematical work was at times simplistic and inaccurate, a portion of a letter written by him to the Supervisor of Shipbuilding on July 3, 1968, suggests that the real problem did not lie with plaintiff:

> In view of the unsymmetrical and extremely complex structure, as well as the presence of many non-linear and non-elastic elements representing the boiler and *the many assumptions which are required to be made in attempting to model and simulate the response of the boiler under shock, the validity of the result of the dynamic analysis of a boiler is highly questionable.* Therefore, the Design Agent has serious doubts as to whether the results of the analysis are sufficiently reliable to justify making any additional changes in the boiler design. It is also questioned as to whether further analyses as requested in Reference (a) are justifiable. [Emphasis supplied.]

Other defense witnesses testified about the value and utility of DDAM as applied to a boiler. They suggested that the Muster Committee Report contained some factual inaccuracies. When pressed on cross-examination, however, the witnesses were unable to challenge effectively plaintiff's claims that the contract, if possible to perform at all, could not be performed within 13 or 15 months, and that no other boiler manufacturer had succeeded where plaintiff failed. In addition, their isolated criticisms of the Muster Committee Re-

port did not, in our view, lessen the significance of the Report's conclusions. The significance of the Report was not lost on the Government either, for a defense witness testified that it was the Muster Committee Report which led the Government to lessen the burden placed on future contractors with respect to shock-hardness (see discussion of this policy change beginning at D above).

All of the foregoing clearly prompts the conclusion that the building of a shock-hard boiler was shown to be beyond the state of the art. While the expert evidence preponderates heavily in plaintiff's favor, the convincing evidence is that neither FWC nor any other boiler manufacturer has succeeded in building a shock-hard boiler, and that the Government has retreated in its requirements as a result of the Muster Committee Report.

Plaintiff's evidence was also directed toward a showing of "commercial" impossibility. Under this theory, it is contended that the construction of a shock-hard boiler, even if ultimately possible, could not be accomplished without commercially unacceptable costs and time input far beyond that contemplated in the contract. To design a shock-hard boiler by means of a mathematical model and dynamic analysis could, said plaintiff's witness, Mr. Perryman, take an infinite amount of time. The preparation of the model, with review and rework followed by the dynamic analysis and its review and rework, would require 16 months, *assuming* results were consistent with the performance requirements of the boiler. With 8 months added for fabrication, the minimum time in which the contract could be performed would be 24 months. If it happened that the shock-hardness qualities of the boiler conflicted with performance requirements, there would be need for a design compromise which would begin the entire cycle over again.

Even if no rework and no new cycle proved necessary—an extremely unlikely possibility—a minimum of 19 months would be necessary to perform the contract. The commercial impossibility of performing the contract is supported by plaintiff's experts and also by the Muster Committee Report, as quoted above.

The evidence shows, therefore, that the AGC–19 contract contained specifications which were impossible to meet, either commercially or within the state of the art.

V

Assumption of the Risk of Impossibility

The Board found [20] that FWC generally assumed "contractual responsibility and risk" of impossibility. Assumption of risk, like impossibility, is a mixed question of fact and law, fact as to the statements and actions of the parties, but law as to the significance of these statements and actions, particularly the interpretation of contract language.

There is no dearth of precedent on the subject of assumption of risk of impossibility. Two factual questions have emerged from these earlier cases to be determinative of the the legal issue: (1) which party had the greater expertise in the subject matter of the contract? and (2) which party took the initiative in drawing up specifications and promoting a particular method or design?

As to question one, the evidence establishes that while DDAM was, as a concept, not new at the inception of the AGC–19 contract, application of this concept in an attempt to achieve an entire, shock-hard boiler was a "first" for plaintiff (and, it appears for anyone). FWC's only prior contractual experience in the use of DDAM to test a boiler was limited to the foundation parts of boilers only, and at lower G-force requirements. The testimony and events demonstrate convincingly that the difficulties in use of DDAM increase enormously with the complexity of the structure which is to be designed shock-hard. That a boiler is such a complex structure may be garnered from the July 3, 1968 letter of the Government's Design Agent, quoted in relevant part *supra*, and from the following excerpt from the Muster Committee Report:

> The boilers present particularly difficult problems which it is necessary to design by presently specified dynamic analysis procedures. The boiler contains a great number of tubes which vary in size, shape, and length.

[20] 72–2 BCA at 44,185.

> Some of the tubes are cantilevered and many have long unsupported sections. Although the long flexible tubes are ideal considering the thermal expansion associated with normal boiler operation, these low frequency systems are subject to high calculated stresses under shock.

The Government's expertise in the application of DDAM to marine equipment at least equalled, and probably surpassed, plaintiff's. The leading study on DDAM in this area was done by Government employees (the Government's expert witnesses at the hearing), Robert O. Belsheim and George J. O'Hara. Published in May 1961, the Belsheim & O'Hara study was entitled "Shock Design of Shipboard Equipment, Part 1—Dynamic Design-Analysis Method." The study was listed in the invitation for bids as a guide to contractors in performing the contract. Plaintiff's proposal to the Government included the statement below:

> Foster Wheeler will use the specified Belsheim & O'Hara surface ship inputs in the shock analysis. These are included in our dynamic shock computer program.

Testimony of plaintiff's witnesses confirmed the fact that plaintiff was relying on the Belsheim & O'Hara study throughout the contract period. Furthermore, the Government's witness, Mr. Richardson, the head of Gibbs & Cox's scientific division, testified that, although FWC had the expertise in design and fabrication of boilers, the Government knew more about DDAM than plaintiff.

Notwithstanding the above, plaintiff was not entirely a novice in the application of DDAM to boilers. During 1965, the year prior to the award of the AGC–19 contract, plaintiff carried out an in-house study of DDAM as applied to a somewhat different boiler design. The study was not done for any particular contract, but as general preparation for future contracts, such as the one in issue, which plaintiff knew would involve DDAM. From this study, plaintiff could surmise that its *non*shock-hard boiler design would not satisfy shock-hard requirements without some amount of modification.

In summary, plaintiff had some limited experience in the application of DDAM to boilers, but it was *not* the "expert" of the two parties, either in fact, or in the Government's perception.

Relative to the second question (which party took the initiative in drawing up specifications and promoting a particular method or design?), the invitation for bids, sent to plaintiff, included extremely detailed performance specifications, the great majority of which were prescribed by the Government. Those not specified by the Government were to be filled in by FWC and included in its bid. In addition, the Government specified "limiting dimensions" of the boiler, some internal dimensions, and very few design specifications. There was a detailed list of equipment which the boilers were to include. Design was restricted by requirements of access to the various components for inspection and maintenance.

In addition to the specifications described above, Appendices A and B to the contract contained the shock-hardness specifications which FWC was required to meet. The invitation listed a desired delivery in 13 months, and a maximum delivery date of 15 months. Plaintiff agreed to a 13-month period in its bid.

Finally, the invitation required that the contractor's bid include the following:

> * * * a detailed statement concerning the design procedures contemplated, setting forth the points of interest for stress and deflection checking, a rough mathematical model and the number of iterations anticipated for a successful design. The Seller's proposal shall also include a statement as to Seller's past experience with respect to preparation of mathematical models and dynamic shock analysis, and whether this work will be performed by the Seller's own staff or an outside consultant.

On November 22, 1965, plaintiff wrote to the Government officials to describe its qualifications, experience, and suggested solution, as required by the contract. Also, a meeting was held that day to discuss the 1965 in-house DDAM study carried out by FWC on another boiler. The contract was awarded February 21, 1966.

After reciting substantially the above facts,[21] the Board made the following conclusory statement:[22]

[21] 72-2 BCA at 44,177-178.
[22] 72-2 BCA at 44,178.

Opinion of Trial Judge

> Evidence for appellant shows that when it bid for and received this contract for dynamically-designed, high-strength boilers for the AGC–19 and for design strength tests, its engineering staff was aware of the implications of the dynamic design requirements and the specified dynamic shock analysis test procedures. * * * The contract award shows that the Government was persuaded by appellant's demonstration that it had the experience, competence and qualifications to perform the specified work.

The vagueness of the statement is such as to make very difficult the ascertainment of its intended significance. FWC was said to be "aware of the implications" of DDAM, but we are not told what "implications" the Board had in mind. There is no reason to believe that either party was aware that the contract would prove impossible to perform, nor that the task would be so very formidable.[23]

The Board stated also that the Government was "persuaded" by plaintiff that the latter could do the job. Plaintiff surely attempted to convince the Government that its qualifications were as good or better than those of its competitors, but the contract *required* that the Government be persuaded to award the contract to plaintiff on the basis of its experience, qualifications, and recommendations. The fact that plaintiff's bid was the lowest of the three received was undoubtedly another persuasive factor.

The risk that contract specifications will prove impossible to meet may lie with the Government, the contractor, or both (in the case of mutual mistake of fact).

The leading case in this court in which risk of impossibility is imposed on the Government is *Hol-Gar Mfg. Corp., supra.* There, the Air Force issued a Request for Proposals for the manufacture of 107 electric generator sets which would meet the Government's elaborate performance specifications. Con-

[23] The contract period, 13 months, was the usual period for design and fabrication of a *non*shock-hard boiler. The relative amounts to be spent on the fabrication of the boiler and the DDAM work—$271,970 and $8,500, respectively—suggest that complications in DDAM work were not anticipated (compare to FWC's May 17, 1968, claim for an equitable adjustment, wherein $139,593 of costs were claimed for the DDAM portion of the work). Testimony of *both* Government and FWC witnesses reveals that neither party believed that substantial modification of FWC's *non*shock-hard design would be required. Finally, the use of a *fixed-price, supply* contract is also indicative of the parties' intentions and expectations. See *Johnson Electronics, Inc.*, ASBCA No. 9366, 65–1 BCA ¶ 4628 (1964).

tractors were to submit a Technical Proposal consisting of analyses of proposed methods of compliance, anticipated problems, and solutions to the problems. A bidder's conference was held, and technical details of the specifications were reviewed. Plaintiff subsequently submitted its proposal, which, in accordance with the Government's requirement, suggested the type of engine which it believed would meet the specifications. The contract called for delivery of design data within 70 days, followed by manufacture.

The contractor eventually concluded that the engine it was adapting could not meet the specifications and suggested the relaxation of size and weight limitations such that another type of engine could be used. Defendant agreed to do so. The contractor then claimed its costs of attempting to meet the original specifications. In awarding these costs, this court stated (at p. 524, 360 F. 2d at 638):

> That changes in the specifications were required is clear from the fact that after numerous negotiation sessions, during which time the plaintiff was attempting unsuccessfully to comply with the specifications, they were changed by the execution of Supplemental Agreement No. 8. We are of opinion that this "change cause[d] an increase * * * in the cost of * * * performance of this contract," because the change in specifications made useless some of the expenditures plaintiff had made up to that point, but plaintiff was nevertheless out of pocket this money and it must be included in its cost of performance. Since the necessity for the change was not due to plaintiff's fault, but to faulty specifications, an equitable adjustment requires that plaintiff be paid the increase in its costs over what they would have been had no change been required.
>
> The Armed Services Board of Contract Appeals has recognized the correctness of the allowance of costs incident to an attempt to comply with defective specifications. See, *e.g.*, *J. W. Hurst & Son Awnings, Inc.*, 59–1 BCA ¶2095 at 8965 (1959), where the Board stated:
>
> > * * * Where, as here, the change is necessitated by defective specifications and drawings, the equitable adjustment to which a contractor is entitled must, if it is to be equitable, i.e., fair and just, include the costs which it incurred in attempting to perform in accordance with the defective specifications and drawings. Under these cir-

cumstances the equitable adjustment may not be limited to costs incurred subsequent to the issuance of the change orders. [Citations omitted.]

The similarities between *Hol-Gar Mfg. Corp.*, *supra*, and the instant case are striking and compelling. Both cases involve (1) a fixed-price, supply contract, (2) detailed performance specifications drawn up by the Government, (3) a requirement that the contractor submit a Technical Proposal, (4) meetings of the parties when the contractor's difficulties became apparent, and (5) an eventual relaxation of specifications by the Government so that the contractor would be able to complete the contract. The *Hol-Gar* decision was expressly followed in *Maxwell Dynamometer Co.* v. *United States*, 181 Ct. Cl. 607, 386 F. 2d 855 (1967), and we follow it here.

Defendant asserts that the instant case falls within that line of cases in which the *contractor* was deemed to have assumed the risk of impossibility. See, *e.g.*, *J. A. Maurer, Inc.* v. *United States*, 202 Ct. Cl. 813, 485 F. 2d 588 (1973); *Bethlehem Corp.* v. *United States*, 199 Ct. Cl. 247, 462 F. 2d 1400 (1972); *Austin Co.* v. *United States*, 161 Ct. Cl. 76, 314 F. 2d 518, *cert. denied*, 375 U.S. 830 (1963). These cases, however, have the common elements, not present in the instant case, that the contractor in each had expertise superior to the Government's, and that in some manner the initiative was wrested by the contractor from the Government's hands. [24]

The factual circumstances here are likewise not amenable to a finding of mutual mistake of fact. The chief consideration which led the court to find mutual mistake in *National Presto Industries, Inc.* v. *United States*, 167 Ct. Cl. 749, 338 F. 2d 99 (1964), *cert. denied*, 380 U.S. 962 (1965), was a "mutual agreement" of the parties prior to award of the contract, such that the court viewed the project as a "joint

[24] In *J. A. Maurer, Inc., supra*, the contractor assured the Government officials that it had the special expertise to perform, by its own technique, a very experimental task which it knew had never been accomplished previously. In both *Bethlehem Corp., supra*, and *Austin Co., supra*, the contractor actually substituted one or more specifications for the Government's, and then assured the Government that it could perform the contract as modified.

enterprise."[25] That case did *not* involve a claim of impossibility of performance. In any contract in which the specifications turn out to be impossible to perform, one might claim a mutual mistake of fact in that neither party contemplated the impossibility. However, something more than this must be present, namely, a "joint enterprise," which is lacking in the instant case.

Defendant's reliance on our decisions of *Sperry Rand Corp.* v. *United States*, 201 Ct. Cl. 169, 475 F. 2d 1168 (1973), and *Clavier Corp.* v. *United States*, 202 Ct. Cl. 1098 (1973), is misplaced. Those cases dealt with the assumption of risk by a contractor in a fixed-price contract that eventual cost of performance will exceed anticipated cost. This is entirely different from the assumption of risk that the specifications will prove impossible to perform.

VI

Defendant's Waiver Defense

Defendant maintains that any recovery rights, which plaintiff might otherwise have, were waived at the October 4, 1967 meeting, because plaintiff did not at that time expressly reserve any right to claim an equitable adjustment. But the evidence of the October 4 meeting shows no discussion of costs whatsoever. If what had been involved in that meeting was a "change" which was to cause a subsequent increase in plaintiff's costs, then plaintiff could have been obligated under the contract to apply for an equitable adjustment within 30 days.[26]

However, the agreement of October 4 did not mark an *increase* of costs, but rather was (or should have been) the *termination* of those costs which are recoverable because they were incurred in the attempt to achieve impossible requirements. Actually, in this instance as a result of the Government's reneging on its October 4 agreement, plaintiff con-

[25] See *Natus Corp.*, *supra*, at 13–14, 371 F. 2d at 458 (1967), for an analysis of the holding in the *National Presto Industries, Inc.* case.

[26] The "Changes" clause required the contractor to assert a claim for adjustment "within 30 days from the date of receipt by the Contractor of the notification of change."

tinued to incur costs beyond October 4 and even beyond May 17, 1968, when it made its claim to the contracting officer.

We can find no prejudice to the Government resulting from plaintiff's failure to reserve expressly a claim for costs at the time of the agreement on October 4. At that point the harm had been done, and plaintiff had been authorized to fabricate the boiler, thereby completing the contract. Contrast *Ling-Temco-Vought, Inc.* v. *United States*, 201 Ct. Cl. 135, 475 F. 2d 630 (1973), wherein the contractor delayed in asserting a breach of contract by the Government, and, by continuing to incur costs, increased greatly the damages for which the Government would have been liable.

Finally, defendant's affirmative defense of waiver was not raised before the Board, nor was it stated in "Defendant's Answer," as required in our Rule 37(b).

VII

*Conclusion**

We hold that the AGC–19 contract was impossible to perform, that the Government must bear the risk of impossibility, and that plaintiff has not waived its claim. Plaintiff is thus entitled to recover an equitable adjustment, pursuant to the "Changes" clause, of costs incurred in attempting to meet faulty specifications.

Plaintiff's Motion for Summary Judgment is granted; defendant's cross-motion is denied. Since the parties have not yet had an opportunity to present proof of costs, this case is remanded pursuant to Rule 149 to the Armed Services Board of Contract Appeals for further proceedings in accordance with this decision (*i.e.*, for a quantum determination of an equitable adjustment under the "Changes" clause of the contract), with plaintiff's counsel being directed to advise the court by letter to the trial judge on the status of the proceedings at 90-day (or less) intervals.

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* The trial judge's original recommended conclusion has been changed in form by the court to conform to the provisions of Rules 149 and 150 which became effective October 1, 1974, after the recommended conclusion had been made.

Syllabus

JULIUS R. BOEGE, ET AL. v. THE UNITED STATES

[No. 75-73. Decided April 16, 1975]

ON PLAINTIFFS' AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

Civilian pay; allowances; locality v. shipboard per diem rates outside continental United States; agency discretion in setting per diem; Naval Oceanographic Office.—Plaintiffs, civilian personnel employed by the United States Naval Oceanographic Office (NAVOCEANO) to conduct oceanographic surveys, seek the higher locality per diem rates for all days a vessel on which they serve is in any port outside continental United States (CONUS) during which time they use commercial quarters rather than shipboard quarters. Lower per diem rates apply if shipboard quarters are used. Plaintiffs received free shipboard lodging (undisputed by the parties). Prior to July 1, 1970 NAVOCEANO personnel were paid locality per diem rates for the entire time a vessel was in any port outside CONUS. Effective July 1, 1970 the NAVOCEANO Commander reduced the in-port per diem rates from the locality to shipboard per diem for all its civilian personnel unless the employee was *required* to maintain commercial quarters during in-port visits. On December 15, 1970, the Comptroller General held NAVOCEANO's action inappropriate and ruled the personnel entitled to shipboard per diem rates for the first 3 days in port outside CONUS with locality per diem rates for all subsequent stopover days. On October 1, 1971 Department of Defense (DOD) regulations were amended to conform to this decision. It is *held* (1) that, contrary to plaintiffs' contention, 5 U.S.C. § 5911(e) prohibiting requiring occupancy of government-owned rental quarters by civilian personnel, does not apply on its face to shipboard quarters in a foreign port which are provided free of charge; (2) that plaintiffs have failed to meet their burden of proof that DOD abused its discretion either in changing its per diem practices effective July 1, 1970 or, in conformance with the Comptroller General's decision, in subsequently modifying the change to grant locality per diem after a predetermined waiting period, particularly since this modification accrued to plaintiffs' benefit; and (3) that defendant has properly interpreted and applied its own regulations, and plaintiffs' assertion that the regulations applied were technically defective is without merit. Plaintiffs are not entitled to recover, their motion for summary judgment is denied, defendant's cross-motion is granted, and the petition is dismissed.

Statutes; construction and operation; unambiguous language; generally.

[1] A clear and unambiguous statute speaks for itself, and while judicial tribunals may go beyond the language contained in a statute

Syllabus

to ascertain its meaning, they must be careful in departing from statutory terms in order to avoid doing violence to them. Thus, the unambiguous wording of a statute shall be given its plain and commonly understood meaning.

Statutes ⇐ 190

Civilian pay; quarters allowance; shipboard quarters in foreign port.

[2] 5 U.S.C. § 5911(e) prohibits requiring the occupancy of government-owned *rental* quarters by civilian employees, and does not apply to shipboard quarters in a foreign port which, as undisputed by the parties, are provided free of charge.

Armed Services ⇐ 27

Civilian pay; travel and subsistence allowances; per diem; agency discretion in setting.

[3] 5 U.S.C. § 5702 grants discretion to Government agencies in determining what per diem allowances are applicable to different categories of travel or temporary duty status. Thus, where the subject agency, after an interpretation of per diem regulations by the Director, Office of Civilian Manpower Management, issued instructions directing payment to civilian ship personnel of shipboard per diem rates "where travelers aboard Government ships are *not required* to maintain commercial quarters ashore" in recognition that determination of the actual temporary duty station is a prerequisite to a particular applicable per diem rate, it was an exercise of agency discretion to clarify the temporary duty station as the ship, whether at sea or in port, unless said personnel would be required to maintain commercial quarters ashore and, if so required, then the temporary duty station would become the port, with payment of appropriate per diem rates as provided in existing regulations.

Armed Services ⇐ 27

Civilian pay; administrative discretion; arbitrary action; burden of proving.

[4] Where an exercise of administrative discretion is involved, the action will be disturbed only if plaintiff succeeds in establishing that it is so clearly wrong as to be arbitrary.

Administrative Law and Procedure ⇐ 755

Regulation of Executive Department; construction and operation; administrative construction; generally.

[5] The agency delegated the authority for promulgating and interpreting regulations is presumed to have carried out such responsibilities properly.

Administrative Law and Procedure ⇐ 749

Gary B. Landsman, Staff Counsel, *American Federation of Government Employees, AFL-CIO*, attorney of record for plaintiffs.

Raymond B. Benzinger, with whom was *Assistant Attorney General Carla A. Hills*, for defendant.

Before COWEN, *Chief Judge*, NICHOLS and KUNZIG, *Judges*.

KUNZIG, *Judge*, delivered the opinion of the court:

This is a civilian pay suit in which plaintiffs basically challenge the exercise of Department of Defense (DOD) discretion in determining the in-port per diem rates for Naval Oceanographic Office (NAVOCEANO) personnel. DOD now authorizes payment of shipboard per diem rates for the first three days a NAVOCEANO vessel is in any port outside the Continental United States (CONUS), with higher locality per diem rates permitted for all subsequent days in port. We fail to find any abuse of administrative discretion and conclude plaintiffs are not entitled to locality per diem rates for their first three days in port.

Plaintiffs are civilian shipboard personnel employed by NAVOCEANO aboard ships throughout the world conducting oceanographic and hydrographic surveys. The material facts herein are not in dispute. Survey schedules normally allow for approximately 25 to 28 days at sea and five to seven days in various ports. While assigned to a NAVOCEANO vessel, whether at sea or temporarily in some foreign port, plaintiffs receive lodging aboard ship. Defendant has stated (and plaintiffs have not disputed) these quarters are provided without charge.

Prior to July 1, 1970, NAVOCEANO personnel were paid locality per diem rates for the *entire time* the vessel on which they were assigned was in any port outside CONUS. Locality per diem rates are based upon varying local costs of living and are specifically established by the Department of State for various cities and ports around the world. On June 29, 1970, the Commander of NAVOCEANO issued NAVOCEANONOTE 4650 which, effective July 1, 1970, reduced the in-port per diem rates from the locality per diem to the lower shipboard per diem for all NAVOCEANO civilian personnel unless the employee was *required* to maintain commercial quarters during the in-port visits.

Following several challenges by NAVOCEANO civilian personnel, the Comptroller General, in Decision No. B–170655, 50 Comp. Gen. 389 (1970), held the NAVOCEANO determination paying only shipboard per diem rates for *all* in-port time to be inappropriate. While sanctioning the payment of shipboard per diem rates for a "reasonable stopover period" for refueling and taking on new supplies, the Comptroller General found entitlement to the higher locality per diem rates for any in-port period in excess of a "reasonable stopover period." Finding a three-day stopover not unreasonable for refueling and taking on supplies, the Comptroller General ruled NAVOCEANO personnel entitled to payment of shipboard per diem rates for the first three days in port, with higher locality per diem rates for stopover days in excess of three. The DOD immediately conformed to this decision and codified it into regulation on October 1, 1971.[1]

Plaintiffs' challenge of the denial of locality per diem rates is before this court on cross-motions for summary judgment. Citing our jurisdiction under 28 U.S.C. § 1491, plaintiffs seek payment of locality per diem rates for the first three days of any in-port stopover, retroactive to July 1, 1970, and retroactive payment of locality per diem rates for any other days in any port which was denied them due to the DOD policy change between July 1, 1970 and December 15, 1970. For the reasons stated below, we hold for defendant.

Plaintiffs first assert this denial of locality per diem rates in essence compels them to occupy government-furnished lodging. Plaintiffs maintain this *mandatory* use of government-furnished lodging contradicts the prohibitory language against such practices found in 5 U.S.C. § 5911(e). Defendant counters that 5 U.S.C. § 5911(e) does not apply to plaintiffs' situation since it only prohibits requiring the occupancy of government-owned *rental* quarters. We agree with defendant.

It is a long-established principle of statutory construction that a clear and unambiguous statute speaks for itself. This

[1] On October 1, 1971, Joint Travel Regulation (JTR) par. C8101–3b(6) was amended to reflect the interpretation of the regulations made by Comptroller General Decision No. B–170655.

court has long recognized that, while judicial tribunals may go beyond the language contained in a statute to ascertain its meaning, they must be careful in departing from statutory terms in order to avoid doing violence to them. *Crawford* v. *United States*, 179 Ct. Cl. 128, 138, 376 F. 2d 266, 272 (1967), *cert. denied*, 389 U.S. 1041 (1968). Thus, the unambiguous wording of a statute shall be given its plain and commonly understood meaning. *Selman* v. *United States*, 204 Ct. Cl. 675, 683, 498 F. 2d 1354, 1358 (1974); *Benton* v. *United States*, 203 Ct. Cl. 263, 269, 488 F. 2d 1017, 1020 (1973); *Ricker* v. *United States*, 184 Ct. Cl. 402, 406, 396 F. 2d 454, 456 (1968); *Prudential Ins. Co. of America* v. *United States*, 162 Ct. Cl. 55, 65, 319 F. 2d 161, 166 (1963).

5 U.S.C. § 5911(e) reads as follows:

> (e) The head of an agency may not require an employee or member of a uniformed service to *occupy quarters on a rental basis*, unless the agency head determines that necessary service cannot be rendered, or that property of the Government cannot adequately be protected, otherwise. [emphasis added] [2]

A simple reading of the above statute clearly shows that it only applies to government-furnished quarters on a *rental* basis. Since it is not disputed that shipboard quarters are provided free of charge, defendant is quite correct in pointing out that 5 U.S.C. § 5911(e), on its face, has no application in the instant situation.

Although unnecessary, a review of the legislative history of 5 U.S.C. § 5911 is supportive of defendant's position. 5 U.S.C. § 5911 was enacted in 1964 "to restate and clarify existing statutory authority and regulations which authorize the providing by the Government of *rental quarters* and certain related services for Government personnel." [emphasis added] H.R. REP. No. 1459, 88th Cong., 2d Sess. 2 (1964). Subsection (e) [orginally Section 5 of the Act] "restates the prohibition against forcing employees to occupy Government quarters on a *rental basis* * * * [and] is applicable to all quarters for which the occupants are *charged*

[2] U.S.C. § 5911(a) defines quarters as follows: "quarters owned or leased by the Government."

a rental (whether Government-owned or Government-leased), *but is not applicable to free quarters.*" [emphasis added] H.R. REP. No. 1459, 88th Cong., 2d Sess. 6 (1964). Thus, even if the language of this statute were not clear and unambiguous, the statements contained in the House Report leave little doubt that Congress did not intend 5 U.S.C. § 5911(e) to apply to free quarters provided by the Government.

As 5 U.S.C. § 5911(e), by its express language, applies only to rental quarters and since this interpretation is buttressed by the language found in H.R. REP. No. 1459, we conclude this statute has no application to plaintiffs' situation, and, therefore, does not serve to invalidate the Government's imposition of lower shipboard per diem rates.

Since we reject plaintiffs' primary argument, we must focus secondly on the alternative theories advanced. Although not articulately stated in their brief, plaintiffs seem to assert two alternative grounds: first, the denial of locality per diem rates for the first three days in port after December 15, 1970 constitutes an abuse of agency discretion; and second, absent an abuse of agency discretion, the denial is technically defective because the shipboard per diem subsection of the Joint Travel Regulations (JTRs) applies only to travel and temporary duty status within CONUS. We reject both arguments.

The abuse of agency discretion argument is predicated on plaintiffs' assertion that the three-day "reasonable stopover period" finding by the Comptroller General was arbitrary and, therefore, any implementation by DOD [3] of this arbitrary finding constitutes an abuse of agency discretion. The problem with this argument is that it tends to deal with the implementation of the Comptroller General's Decision No. B–170655 in a vacuum and fails to address the exercise of DOD discretion which led to the Comptroller General's decision. A preliminary issue which plaintiffs do not raise expressly, but which this court cannot avoid, is whether DOD,

[3] *See* note 1, *supra*.

in issuing NAVOCEANONOTE 4650, abused its discretion in altering its per diem rate payment policy.[4]

NAVOCEANONOTE 4650 directed payment of shipboard per diem rates "where travelers[5] aboard Government ships are *not required* to maintain commercial quarters ashore," effective July 1, 1970. [emphasis added] Prior to that date, DOD civilian personnel in this travel category were paid the higher locality per diem rates for all time ashore when commercial quarters were utilized, regardless of whether such utilization was voluntary or required. This directive, issued after an interpretation of JTR par. C8101–2d by the Director, Office of Civilian Manpower Management, reflected an agency recognition that the determination of the actual temporary duty station is a prerequisite to a particular applicable per diem rate. In the case of civilian personnel assigned to a temporary duty station aboard a Government ship, the per diem rate applicable to the ship would be paid, whether at sea or in port, unless, by agency direction, personnel were *required* to maintain commercial quarters ashore. In effect, this interpretation recognized that shipboard personnel are assigned to temporary duty on the ship itself, and their temporary duty stations only change to port when officially ordered.

Thus, as of July 1, 1970, DOD exercised its discretion in clarifying the temporary duty station of civilian personnel aboard Government ships: the temporary duty station is the ship, whether at sea or in port, unless said personnel would be *required* to maintain commercial quarters ashore; if so required, the temporary duty station would then become the port. Appropriate existing subsections of the JTRs would then be applied, with the per diem rates contained therein being awarded.

[4] DOD's discretion in establishing per diem rates for various travel or temporary duty stations is not disputed. 5 U.S.C. § 5702 is the statutory basis under which Federal employees are entitled to per diem allowances. In pertinent part, it states:

"An employee, while traveling on official business away from his designated post of duty, is entitled to a per diem allowance *prescribed by the agency concerned.* * * *" [emphasis added]

There can be little question that the above language grants discretion to Government agencies in determining what per diem allowances are applicable to different categories of travel or temporary duty status.

[5] Plaintiffs agree the term "travelers" includes persons assigned to temporary duty on Government ships.

Opinion of the Court

The proper standard for our review of the Department of Defense decision regarding the clarification of the situs of a temporary duty station for the purpose of determining the applicable per diem rate is whether there is a rational basis in the record for that determination. "Where an exercise of administrative discretion is involved, the action will be disturbed only if plaintiffs succeed in establishing that it is 'so clearly wrong' as to be arbitrary." *Drucker* v. *United States*, 204 Ct. Cl. 514, 517–18, 498 F. 2d 1350, 1352 (1974), *citing Albert* v. *United States*, 194 Ct. Cl. 95, 101–02, 437 F. 2d 976, 979 (1971).

By focusing on Comptroller General Decision No. B–170655 and the regulation promulgated by DOD to implement the decision, plaintiffs have completely ignored the question of whether the July 1, 1970 change, which formed the basis for the appeal to the Comptroller General, constitutes an abuse of agency discretion. And, in ignoring the question, it is obvious that plaintiffs have failed to meet their heavy burden of proving that the July 1, 1970 DOD action was so arbitrary as to be clearly wrong. *Drucker*, *supra*. *See also United States* v. *Shimer*, 367 U.S. 374, 381–82 (1961). But even if plaintiffs had addressed this issue, the evidence contained in the Joint Stipulation of Facts refutes any argument that no rational basis existed for the July 1, 1970 per diem rate change.

While it is true that other reasons were expressed in support of this per diem rate change, one fundamental reason (included in the Joint Stipulation of Facts) was expressed in all of the correspondence which preceded the issuance of NAVOCEANONOTE 4650: the opinion that shipboard per diem rates should be paid unless civilian personnel were *required* to maintain commercial quarters ashore. This justification for lower shipboard per diem rates, evidenced in the record, certainly satisfies the rational basis test.

Since we therefore hold DOD did not abuse its discretion by implementing the July 1, 1970 change in per diem rate policy, it is difficult to see how the agency could have abused its discretion by subsequently modifying the policy to the benefit of plaintiffs; and it is even more difficult when we in-

clude the additional factor that the modification was made pursuant to a decision by the Comptroller General.

It is important to note that Comptroller General Decision No. B–170655 nowhere indicated that the July 1, 1970 action constituted an abuse of discretion. On the contrary, the Comptroller General agreed with DOD that the vessel, and not the port, was the employees' temporary duty station,[*] and, therefore, under ordinary circumstances, i.e., unless *required* to maintain commercial quarters ashore, said employees are entitled only to the shipboard per diem rates.

We have not been asked to decide whether the Comptroller General's decision to reinstate the locality per diem rate for periods exceeding three days should be upheld. DOD, by incorporating his decision into the Joint Travel Regulations, has acquiesced in this position. We are only asked to decide whether DOD's implementation of his decision with respect to shipboard per diem for the *first* three days in port constitutes an abuse of agency discretion. Clearly it does not.

In short, plaintiffs have not shown DOD abused its discretion in denying NAVOCEANO personnel locality per diem when in a foreign port. At best, plaintiffs have shown only that a change was made on July 1, 1970 and that a modification of this change was subsequently made granting locality per diem after a predetermined waiting period. Neither change is inherently unreasonable.

Plaintiffs' final argument, that the application of shipboard per diem rates to personnel outside CONUS is technically defective, is equally without merit. The gravamen of this position is the fact that JTR par. C8101–2 is entitled "TRAVEL *WITHIN* THE CONTINENTAL UNITED STATES BY REGULAR SALARIED EMPLOYEES."

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[*] In Comptroller General Decision No. B–170655, 50 Comp. Gen. 389, 390 (1970), the following was stated:

"The employees here involved are assigned extended tours of temporary duty aboard specific survey vessels and during voyages, *including stopovers for taking on fuel and other supplies, the vessels—as distinguished from a port at which a stop might be made—are, in essence, the employees' temporary duty stations.* * * * We, therefore are of the opinion that the employees involved are entitled under ordinary circumstances only to the per diem prescribed in paragraph C8101–2d, (shipboard per diem rates) quoted above." [citation omitted] [emphasis added]

Plaintiffs allege, in effect, that establishment of shipboard per diem rates has been placed under the label "*within* the United States," and therefore cannot be applicable outside CONUS. Yet the shipboard per diem subsection itself contains cross reference to JTR par. C8101-3b (6). This latter cross reference is found under quite the opposite label "TRAVEL *OUTSIDE* THE CONTINENTAL UNITED STATES BY REGULAR SALARIED EMPLOYEES." Clearly, therefore, shipboard travel is discussed under both labels in the JTRs which may conceivably suggest minor mislabeling.

The simple answer to plaintiffs' argument is that the agency delegated the authority for promulgating and interpreting the JTRs is presumed to have carried out such responsibilities properly. *Thorpe* v. *Housing Authority*, 393 U.S. 268, 276 (1969); *Barrington Manor Apts. Corp.* v. *United States*, 198 Ct. Cl. 298, 304, 459 F. 2d 499, 502–03 (1972); *Ganse* v. *United States*, 180 Ct. Cl. 183, 189, 376 F. 2d 900, 904 (1967). Plaintiffs, by merely pointing out slightly confusing subsection labels, have shown nothing which significantly rebuts the presumption of correct interpretation.

To summarize, we hold 5 U.S.C. § 5911(e) is inapplicable to plaintiffs' situation because the statute, on its face, is not directed at quarters provided free of charge. Additionally, it is determined that plaintiffs have failed to meet their burden of proving any abuse of DOD discretion, either in changing its per diem practices effective July 1, 1970, or in the subsequent modification of the practice after December 15, 1970 (particularly since this modification accrued to the benefit of plaintiffs). Finally, we reject plaintiffs' assertion that the regulations applied were technically defective and hold defendant has properly interpreted and applied its own regulations. Therefore, we conclude plaintiffs are not entitled to the moneys sought, either for the first three days denied after July 1, 1970 or for any other days denied between July 1, 1970 and December 15, 1970.

Accordingly, plaintiffs' motion for summary judgment is denied, defendant's cross-motion is granted, and the petition is dismissed.

Syllabus

513 F. 2d 1375

AMERICAN FIDELITY FIRE INSURANCE CO. v. THE UNITED STATES; ERNST H. BRANDT, III, THIRD PARTY

[No. 176–73. Decided April 16, 1975]

ON PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

Contracts; sureties; rights and remedies of surety; Government as stakeholder; Government right to set off retainages.—Plaintiff, a payment and performance bond surety, seeks reimbursement from the Government of $15,900, the sum it paid to a subcontractor; the full amount due the subcontractor from the contractor was $16,200. The contract was awarded on November 1, 1971; on February 14, 1972 the contractor subcontracted the entire work; on March 3, 1972 the work was accepted by the Government; on April 21, 1972 the surety wrote to the Government demanding that any monies due under the contract be distributed to and placed with plaintiff surety, referring to the California Civil Code dealing with defaulting principals; on May 3, 1972 the Government replied and referred to the practice adopted by sureties "to protect their interests when a contractor is in financial difficulties by having the contractor write [to the contracting officer] instructing him to mail all checks payable to the contractor to an address which is care/of the bonding company"; on May 12, 1972 the Government made payment to the contractor of $14,055.40, but retained $1,990.72; on June 26, 1972 the contractor filed a petition in bankruptcy. It is *held* (1) contingent upon payment by the surety of the $320 balance due the subcontractor, that plaintiff has standing to sue; (2) that under the circumstances, the surety's notice to the Government was such that it made the Government a stakeholder, and the $14,055.40 payment to the contractor was improper; (3) that the surety is not entitled to recover the $1,990.72 retainages; and (4) that since the trustee in bankruptcy did not respond to the summons and since the Government does not have a claim against the trustee until final decision in this case and thus had no opportunity to file a provable claim in the bankruptcy proceedings, it is appropriate for the court to dismiss the Government's claim against the trustee without prejudice to either party. Plaintiff's motion for summary judgment is allowed regarding the $14,055.40 payment but recovery by the surety is conditioned upon the filing with the Clerk of this court a receipt from the subcontractor of payment of $320; the Government's contingent cross-claim against the third-party contractor is allowed in the amount of $14,055.40; the Government's contingent cross-claim against the trustee in bankruptcy is dismissed without prejudice; and plaintiff's

Syllabus

cross-motion for summary judgment as to the $1,990.72 retainage is dismissed.

Contracts; sureties; rights and remedies of sureties; performance and payment bonds.

[1] In order for a payment bond surety to share in the fund unexpended under the contract, it must first pay all of the claims of the laborers and materialmen.

United States ⇐ 74(18)

Contracts; sureties; rights and remedies of sureties; performance and payment bonds; retained contract funds.

[2] The surety who satisfies the contractor's obligations to pay laborers and materialmen under the surety's payment bond has an equitable interest, superior to the interest of the contractor's assignee or the contractor's trustee in bankruptcy, to the unpaid contract balance held by the Government as a stakeholder. Where Government officials, after due notice of the facts giving rise to an equitable right in the surety and of the surety's assertion of such a right, paid out, without a valid reason for so doing, the money in question to someone other than the surety, the surety is entitled to a judgment.

United States ⇐ 74(18)

Contracts; subrogation; contract funds; surety on performance and payment bonds; notice of surety's claim; stakeholder, Government as.

[3] Where the payment bond surety's letter to the Government demanded that any monies due under the contract be distributed to and placed with the surety and referred to specific sections of the California Civil Code dealing with defaulting principals, where the Government's reply referred to the practice adopted by sureties to protect their interest when a contractor is in financial difficulties by having the contractor write the Government contracting officer instructing him to mail checks payable to the contractor to an address care/of the surety, and where only a few days thereafter the Government made partial payment to the contractor without affording the surety sufficient time to arrange for such a letter, under such circumstances the surety's letter to the Government was sufficient to make the Government a stakeholder with judicially defined duties.

United States ⇐ 74(18)

Contracts; subrogation; retained contract funds; Government right of setoff.

[4] Although it has been determined that the Government is liable to plaintiff surety (contingent upon the latter's complete satisfaction of the contractor's obligation to the laborers and materialmen) for the partial payment the Government improperly made to the defaulting contractor, the Government can partially offset its claim for recovery of said payment against the contractor by the amount

of the unpaid funds in its possession. Since the Government's claim against the contractor is contingent upon the surety's successful assertion of its present claim against the Government and since the Government's claim was not discharged by the bankruptcy proceeding because at the time the petition in bankruptcy was filed the possibility of the Government's claim did not exist and was therefore not a provable claim within the intendment of 11 U.S.C. § 35, the Government's right to offset the retainages is superior to that of the surety.

United States ⇐ 74(18)

Pleading and practice; third-party practice; summons to third-party; dismissal without prejudice.

[5] Where the court has determined that contract funds due plaintiff surety were improperly paid by the Government to the defaulting contractor, and where the Government's claim against the contractor or the trustee in bankruptcy of the contractor was not a provable claim within the meaning of 11 U.S.C. § 35, it is appropriate for the court to dismiss without prejudice the Government's claim against the trustee who was summoned but who has not responded, so that the Government may press its claim against the trustee in the district court having primary jurisdiction over the bankrupt's assets.

Courts ⇐ 470

Kent Leeds Vallette, attorney of record, for plaintiff.

Bernard M. Brodsky, with whom was *Assistant Attorney General Carla A. Hills*, for defendant. *Leslie H. Wiesenfelder*, of counsel.

Ernst H. Brandt, III, third party, *pro se*.

Before DAVIS, KASHIWA, and KUNZIG, *Judges*.

KASHIWA, *Judge*, delivered the opinion of the court:

This is a suit seeking reimbursement from the Government of payment of $15,900 made by plaintiff surety to a subcontractor on a payment bond. The plaintiff surety and the Government are here on cross motions for summary judgment. For the reasons stated below, we hold that the plaintiff surety may recover $14,055.40, the amount the Government paid the contractor, but not the retainage of $1,990.72 withheld by the Government. We further hold for the Government and against the contractor who is a third-party defendant herein in the amount of $14,055.40.

Contract N62474–72–C–6604 was awarded on November 1, 1971, by the Department of the Navy to Ernst H. Brandt, III, d/b/a Variant Mechanical Contractors (hereinafter referred to as Variant or contractor) for Interim Repairs to Refractory in Boilers 48 and 50, Building 653, Naval Air Station, North Island, San Diego, California. The total amount of the contract was $15,900 which was later increased to $16,046.12. Pursuant to the Miller Act, 40 U.S.C. §§ 270a–270d (1970), *amending* 49 Stat. 793–794 (1935), plaintiff surety on November 22, 1971, executed a performance bond for $15,900 and a payment bond for $7,950. On February 14, 1972, Variant subcontracted the entire work to Marine Boiler Repair, Inc. (hereinafter referred to as Marine Boiler). On March 9, 1972, the Government informed Variant that the work was complete and that it was accepted as of March 3, 1972.

On April 21, 1972, the Government received a letter from the plaintiff surety dated April 19, 1972, demanding that any monies due under the contract be distributed to and placed with plaintiff surety. The text of the letter appears below.[1] On May 3, 1972, the Government responded and stated that it could not comply with plaintiff surety's request. The Government's reply letter appears below.[2]

[1] Letter dated April 19, 1972, addressed to Navy Public Works Center, P.O. Box 113, Naval Station, San Diego, California 92136, from American Fidelity Fire Insurance Company:

"In reference to the above captioned matter and pursuant to that General Agreement of Indemnity as between American Fidelity Fire Insurance Company and Ernst Brandt of Variant Mechanical Contractors, a copy of which is attached hereto, and further pursuant to California Code of Civil Procedure, Section 2847, 2848 and 2849, please consider this letter formal demand that any monies due under the above captioned contract be forthwith distributed to and placed with American Fidelity Fire Insurance Company."

[2] Letter dated May 3, 1972, addressed to American Fidelity Fire Insurance Co., 864 So. Robertson Blvd., Los Angeles, California 90035, from Stuart R. Foots, Counsel, for Navy:

"This is a response to your letter of April 19, 1972 addressed to the Navy Public Works Center, San Diego, California which states that it is a formal demand that any monies due to the prime contractor, Variant Mechanical Contractors, under the subject contract be forthwith distributed to and placed with American Fidelity Fire Insurance Company.

"The reason the Navy cannot comply with your request is explained in a Decision of the Comptroller General of the United States dated January 14, 1970, a copy of which is enclosed. Under the rule set forth in this decision all money in excess of retainages are properly payable to prime contractors in accordance with the contract terms without the necessity of first securing the surety's agreement. Furthermore, your General Agreement of Indemnity

(Continued)

On May 12, 1972, the Government made a partial payment of $14,055.40 to Variant. No other sums have been disbursed under this contract. On May 16, 1972, Marine Boiler presented its claim to plaintiff surety for $16,220 for its performance of the work. Ernst H. Brandt, III, d/b/a Variant Mechanical Contractors, filed a petition in bankruptcy on June 26, 1972, and received a discharge in bankruptcy on October 30, 1972. On August 9, 1972, and on January 1, 1973, plaintiff surety made payments to Marine Boiler totaling $15,900. On November 2, 1972, Variant's trustee in bankruptcy requested that the Government pay to him as trustee the contract retainage of $1,990.72. The trustee has not filed a third-party petition asserting a claim to the $1,990.72.

On March 28, 1973, plaintiff sued Marine Boiler in California Superior Court to recover $7,950 of the $15,900 paid on the ground that plaintiff only intended to pay the $7,950 penal amount of the performance bond, the excess of $7,950 having been paid by mistake.[3] The case is still pending in the California Superior Court. On June 18, 1973, plaintiff surety filed its petition in this court. On September 6, 1973, the Government filed in this case its contingent cross claim against Ernst H. Brandt, III, d/b/a Variant Mechanical Contractors, and the trustee of his estate in bankruptcy.[4]

(Continued)
cannot be treated as an assignment under the Federal Assignment of Claims Statutes, 31 U.S.C. 203, 41 U.S.C. 15, because you are not a bank, trust company or other financial institution.

"Many sureties make it a practice to protect their interests when a contractor is in financial difficulties by having the contractor write a letter to the Officer in Charge of Construction instructing him to mail all checks payable to the contractor to an address which is care/of the bonding company. This enables the bonding company to insure that the contract proceeds are used for proper purposes such as the payment of subcontractors, materialmen, and laborers. Enclosed for your information is a sample of this type of instruction.

"In any event, checks for contract proceeds in excess of retainages must be made payable to the contractor, and even the retainages can only be paid in accordance with an agreement of all parties such as the surety, contractor assignee, if any, or other persons having an interest in the matter or as a court order may dictate.

"With respect to the subject contract you are advised that there will be a charge by the Government for liquidated damages inasmuch as the contract was not completed on time."

[3] See footnote 5 regarding this mistaken payment.

[4] Since the trustee in bankruptcy did not respond to the summons, he is not a third-party defendant but under Rule 41(f) he can be affected by a decision of this court.

The questions involved herein are the following: (1) Does plaintiff surety have standing to sue? (2) Was plaintiff surety's notice of April 19, 1972, to the Government such that it made the Government a stakeholder so that the subsequent payment of $14,055.40 by the Government to the contractor was illegal? (3) Is plaintiff surety entitled to recover the retainage of $1,990.72? (4) Are the contractor and the trustee in bankruptcy liable to the Government to the extent plaintiff surety is entitled to recovery?

The question of standing to sue is raised by the Government because of the rule that in order for a surety to share in the fund unexpended under the contract, it must first pay all of the claims of the laborers and materialmen. *Great American Insurance Co.* v. *United States*, 203 Ct. Cl. 592, 598, 492 F. 2d 821, 824 (1974); *United States Fidelity & Guaranty Co.* v. *United States*, 201 Ct. Cl. 1, 8, 475 F. 2d 1377, 1381 (1973); *American Surety Co.* v. *Westinghouse Electric Manufacturing Co.*, 296 U.S. 133, 137 (1935); *North Denver Bank* v. *United States*, 193 Ct. Cl. 225, 230, 432 F. 2d 466, 469 (1970). The principle is well stated at page 137 of *American Surety Co., supra:*

> Liability to pay was ended, but equities growing out of the suretyship relation survived in undiminished force. Acquittance under the bond did not leave the surety at liberty to prove against the assets of the insolvent principal on equal terms with the materialmen, still less to go ahead of them. The settled principles of the law of suretyship forbid that competition. *Jenkins* v. *National Surety Co.*, 277 U.S. 258, 266. A surety who has undertaken to pay the creditors of the principal, though not beyond a stated limit, may not share in the assets of the principal by reason of such payment until the debts thus partially protected have been satisfied in full. This is the rule where the right to a dividend has its basis in the principle of equitable subrogation. "A surety liable only for part of the debt does not become subrogated to collateral or to remedies available to the creditor unless he pays the whole debt or it is otherwise satisfied." *United States* v. *National Surety Co.*, 254 U.S. 73, 76. * * * [Footnote omitted.]

In this case the total claim of Marine Boiler was $16,220 and plaintiff surety paid $15,900; therefore, the excess claim

over the amount received by the subcontractor is $320.[8] Since the amount is so minor, we assume that plaintiff surety will forthwith pay the same to Marine Boiler. We shall condition the recovery by plaintiff surety upon the filing with the Clerk of this court evidence of payment to Marine Boiler of the said $320. A similar conditional method was adopted by this court in *North Denver Bank*, *supra*, 193 Ct. Cl. at 227–228, 432 F. 2d at 467.

We now turn to the main question of the liability of the Government to plaintiff surety for the payment of $14,055.40 made to the contractor after the Government received notice from plaintiff surety. Plaintiff surety's letter of April 19, 1972, was a demand that monies due under the contract be "distributed to and placed with American Fidelity Fire Insurance Company." Defendant's response dated May 3, 1972, informs the plaintiff that the Navy could not comply with the request. On May 12, 1972, the Government made the payment of $14,055.40 to the contractor.

Several cases of this court have considered the Government's role as a stakeholder. In *Great American Insurance Co.*, *supra*, 203 Ct. Cl. at 598–599, 492 F. 2d at 824–825, this court carefully commented on the Government's role as a stakeholder as follows:

> * * * We have repeatedly held that the surety who satisfies the contractor's obligations to pay laborers and materialmen under the payment bond has an equitable interest, superior to the interest of the contractor's assignee or the contractor's trustee in bankruptcy, in the unpaid contract balance held by the Government as a stakeholder. * * *
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> * * * * *
>
> * * * As in our previous decisions on this point, we hold that the Government improperly abandoned its role as a stakeholder and elected to decide the merits of the conflicting claims by paying the amount in dispute to the assignee without a valid reason for doing so. * * *

[8] We do not think that it is relevant here that the $7,950 in excess of the penal amount of the payment bond was paid by plaintiff surety to the subcontractor by mistake. If only the penal amount of the payment bond were paid, the surety would still have to pay the balance of the subcontractor's $16,220 claim in order to have standing to sue to collect the $14,055.40.

In *The Home Indemnity Co.* v. *United States*, 180 Ct. Cl. 173, 178, 376 F. 2d 890, 893–894 (1967), this court stated:

> When the contract involved here was completed, the Government was the stakeholder of the final payment or security for which there were two contending claimants, the surety and the contractor. In view of plaintiff's equitable rights in the fund, which were superior to those of the contractor, the Government had no right as a stakeholder to settle the question unilaterally by paying the fund to the contractor. * * * [Footnote omitted.]

The language of this court in *Newark Insurance Co.* v. *United States*, 144 Ct. Cl. 655, 658–659, 169 F. Supp. 955, 957 (1959), was more explicit:

> Surely a stakeholder, caught in the middle between two competing claimants, cannot, in effect, decide the merits of their claims by the mere physical act of delivering the stake to one of them. If his position as stakeholder becomes uncomfortable, and the claimants do not take steps to get a judicial solution of the question, the law has provided him with an interpleader proceeding by which he can deposit the stake in court and walk out free of the annoyance of being in the middle.
>
> If it is made to appear that the Government's officials, after due notice of the facts giving rise to an equitable right in the plaintiff surety company, and of the plaintiff's assertion of such a right, paid out, without a valid reason for so doing, the money in question to someone other than the plaintiff, the plaintiff will be entitled to a judgment.

See *United States Fidelity & Guaranty Co.*, *supra*; *Fireman's Fund Insurance Co.* v. *United States*, 190 Ct. Cl. 804, 421 F. 2d 706 (1970); *National Surety Corp.* v. *United States*, 319 F. Supp. 45 (N.D. Ala. 1970); *Argonaut Insurance Co.* v. *United States*, 193 Ct. Cl. 483, 434 F. 2d 1362 (1970).

We have to then determine whether the Government was a stakeholder under the circumstances of this case. With relation to the letter of April 19, 1972, the Government argues that plaintiff surety's letter did not provide the Government with any information to justify it in not paying the contractor and that the letter was so worded that plaintiff surety was demanding that it be paid rather than merely re-

questing that the money be withheld. The Government also argues that there is nothing in plaintiff surety's letter showing that plaintiff surety had reason to believe that the contractor would not pay Marine Boiler. The Government further argues that until the Government paid the contractor, the contractor would not have funds to pay Marine Boiler.

In answer to all of the above arguments, we point out that plaintiff surety's letter of April 19, 1972, specifically refers to the following sections of the California Civil Code: §§ 2847, 2848 and 2849. We set the sections out below because we deem the reference to the sections very pertinent.[6] All of the sections are pertinent in situations when a principal on a bond, the contractor in this case, fails to pay laborers and materialmen or is in such a condition that he appears unable to pay. None of the sections has any application unless there is a defaulting principal or one who is about to default. Once there is a default by the principal, the sections provide in the surety's favor suitable rights including subrogation. In other words, reference to these sections of the California Civil Code coupled with the demand of the plaintiff surety was a caveat that a situation was arising wherein the contractor may default and plaintiff surety wanted to preserve

[6] Although the letter in fact refers to "California Code of Civil Procedure," since that code ends before reaching sections with the mentioned numbers and since the California Civil Code includes sections numbered as mentioned in the letter which are pertinent, we assume that the California Civil Code is what was meant by the reference to "California Code of Civil Procedure."

"§ 2847. Reimbursement of surety by principal

"A PRINCIPAL BOUND TO REIMBURSE HIS SURETY. If a surety satisfies the principal obligation, or any part thereof, whether with or without legal proceedings, the principal is bound to reimburse what he has disbursed, including necessary costs and expenses; but the surety has no claim for reimbursement against other persons, though they may have been benefited by his act, except as prescribed by the next section.

"§ 2848. Subrogation of surety to creditor's rights

"THE SURETY ACQUIRES THE RIGHT OF THE CREDITOR. A surety, upon satisfying the obligation of the principal, is entitled to enforce every remedy which the creditor then has against the principal to the extent of reimbursing what he has expended, and also to require all his co-sureties to contribute thereto, without regard to the order of time in which they became such.

"§ 2849. Surety entitled to benefits of securities for performance

"SURETY ENTITLED TO BENEFIT OF SECURITIES HELD BY CREDITOR. A surety is entitled to the benefit of every security for the performance of the principal obligation held by the creditor, or by a co-surety at the time of entering into the contract of suretyship, or acquired by him afterwards, whether the surety was aware of the security or not."

its right of subrogation. We do not mean that these California Civil Code sections are controlling in this case, but we refer to them because they clearly show what the sender intended to say if the recipient of the letter looked up these Code sections. Danger signals were apparent if the recipient examined these Code sections because they all dealt with defaulting principals.

The Government, in its letter of May 3, 1972, in addition to notifying plaintiff surety that the Navy cannot comply with its request, states as follows:

> Many sureties make it a practice to protect their interests when a contractor is in financial difficulties by having the contractor write a letter to the Officer in Charge of Construction instructing him to mail all checks payable to the contractor to an address which is care/of the bonding company. This enables the bonding company to insure that the contract proceeds are used for proper purposes such as the payment of subcontractors, materialmen, and laborers. Enclosed for your information is a sample of this type of instruction.

The above paragraph indicates that the Government at least was aware that something was amiss.

The Government's letter to plaintiff surety was dated May 3, 1972. Its payment to the contractor was on May 12, 1972. Allowing two days for plaintiff surety to receive the letter, two days for the weekend, and two days for a response to reach the Government, this leaves only three days for plaintiff surety to have an instruction letter from the contractor sent to the Government. This is too short a time under the circumstances.

We hold that under all the circumstances aforementioned the Government became a stakeholder. Once it becomes a stakeholder, its duties are well defined in the three cases, *Great American Insurance Co., supra; The Home Indemnity Co., supra;* and *Newark Insurance Co., supra.* Under the circumstances of this case, we hold the Government liable to plaintiff surety for the $14,055.40 payment made to the contractor.

As for the retainage, it should not be paid to the surety even if it pays the remaining $320 to the subcontractor. The reason is that the Government has a claim against the con-

tractor for the amount improperly paid, $14,055.40, and can, therefore, partially offset its claim by the retainage amount in its possession. See *Maryland Casualty Co.* v. *United States*, 135 Ct. Cl. 428, 141 F. Supp. 900 (1956). "The Government by appropriate action can recover funds which its agents have wrongfully, erroneously, or illegally paid."[7] *United States* v. *Wurts*, 303 U.S. 414, 415 (1938). See *Wisconsin Cent. R.R.* v. *United States*, 164 U.S. 190, 212 (1896), and *United States* v. *Burchard*, 125 U.S. 176, 180–181 (1888).

The Government's claim against the contractor was not discharged by the bankruptcy proceedings since it was not a provable claim within the meaning of the Bankruptcy Act, 11 U.S.C. § 35 (1970), *amending* 30 Stat. 550 (1898), which states as follows in pertinent part:

> (a) Debts not affected by discharge.
> A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as * * * (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; * * *.

In *Everett* v. *Judson*, 228 U.S. 474, 478–479 (1913), the Supreme Court stated, "The bankrupt's discharge is from all provable debts and claims which existed on the day on which the petition for adjudication was filed." The Ninth Circuit said in *Colman Co.* v. *Withoft*, 195 F. 250, 251 (9th Cir. 1912):

> The date of filing the petition in bankruptcy is intended to mark the line of separation between debts that are provable and those that are not provable against the bankrupt's estate. Those that are not provable remain subsisting obligations of the bankrupt, and he is not released therefrom by his discharge. * * *

The claim being asserted against the contractor by the Government is contingent upon plaintiff surety's successful assertion of its claim against the Government for the

[7] This general rule is inapplicable where the Assignment of Claims Act, 41 U.S.C. § 15 (1951), *amending* 12 Stat. 596 (1862), is involved. Great Am. Ins. Co. v. United States, 203 Ct. Cl. 592, 492 F. 2d 821 (1974). That act is not involved in the present case.

$14,055.40 payment made to the contractor and, therefore, is not a provable debt within the intendment of the Bankruptcy Act. Even though 11 U.S.C. § 103(a) (1970), *amending* 30 Stat. 562 (1898), states that "Debts of the bankrupt may be proved and allowed against his estate which are founded upon * * * (8) contingent debts and contingent contractual liabilities; * * *," the debt at issue here was too contingent an obligation as to liability to have been allowable. At the time the Debtor's Petition in Bankruptcy was filed on June 26, 1972, the existence of the contractor's liability to the Government was less than contingent. It had not yet even come into existence. In *Colman Co.*, *supra*, at 252, the court held that a claim was not discharged in bankruptcy where "* * * all the facts necessary to be shown to establish the bankrupt's liability to the claimant had not occurred before the petition in bankruptcy was filed."

In construing § 103(a)(8), the court in *Thompson* v. *England*, 226 F. 2d 488, 490 (9th Cir. 1955), noting that a claim must be both "provable" under § 103 and "allowable" under § 93, stated:

> * * * Dicta in Justice Stone's opinion [in *Maynard* v. *Elliott*, 283 U.S. 273 (1931)] indicates several situations where provable contingent claims are not capable of reasonable estimation and therefore are not allowable. One of these situations is where the bankrupt's obligation is "beyond the control of the creditor, and dependent upon an event so fortuitous as to make it uncertain whether liability will ever attach." * * *

It is clear that the Government's claim against the contractor was "beyond the control" of the Government as creditor because until plaintiff surety filed its petition herein on June 18, 1973, almost one full year after the Debtor's Petition in Bankruptcy had been filed, not even the contingency of the claim existed. When the bankruptcy petition was filed, the Government could not possibly have known that the contractor would ever be indebted to it for the $14,055.40 payment. There was nothing owed by the bankrupt to the Government. "'[D]ebt' in the bankruptcy law * * * does require that something be 'owed' to the creditor." *Zwick* v. *Freeman*, 373 F. 2d 110, 116 (2d Cir. 1967), *cert. denied*,

389 U.S. 835. The Government was not a creditor of the contractor but rather was a debtor. The trustee requested that the Navy pay over the unexpended contract balance under the contract to him as trustee. There was no way that the Government could have established during the bankruptcy proceedings that it had a provable claim for $14,055.40 when plaintiff surety had not yet even instituted suit against the Government. The Government in this case, using procedures under Rule 41, served a summons against the trustee of the bankrupt estate and the Government prayed for judgment against the trustee as well as the contractor. The difficulty with the claim against the trustee is that the Government really does not have a claim against the trustee until final decision in this case. It being so, the Government had no opportunity to file a claim with the trustee and neither has the trustee rejected its claim. There has been no demand and refusal by the trustee to pay.

It appears from the record that the trustee has not responded in any way to the claim of the Government. It is our opinion that under the circumstances the claim against the trustee should be dismissed without prejudice to either party. If the Government wishes to do so and believes it has a valid claim against the trustee, it may bring suit in the United States District Court for the Southern District of California which has primary jurisdiction over the assets of the bankrupt estate. We believe this to be the better procedure. See *In re Levinson*, 7 F. Supp. 110 (E.D. Pa. 1934).

CONCLUSION

Upon the foregoing opinion, the court concludes as a matter of law that plaintiff surety's motion for summary judgment is allowed in the amount of $14,055.40 but that the recovery by plaintiff surety is conditioned upon the filing with the Clerk of this court, within 30 days after the date on which judgment is entered, of a receipt from Marine Boiler of the sum of $320.

The Government's contingent cross claim against the third-party contractor is allowed in the amount of $14,055.40. The Government's contingent cross claim against the trustee in bankruptcy is dismissed without prejudice.

Syllabus

Plaintiff surety's cross motion for summary judgment as to the $1,990.72 in unexpended contract funds still held by the Government is dismissed.

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515 F. 2d 1099

OGDEN PHIPPS AND LILLIAN B. PHIPPS

v.

THE UNITED STATES

[No. 109–72. Decided April 16, 1975]

ON PLAINTIFFS' AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

Taxes; income tax; deductions; interest on indebtedness; interest relating to tax-exempt income; collateral estoppel; partnership.— Plaintiffs seek to recover income tax deficiencies assessed and paid for 1959–63, with interest. This is the second suit brought by plaintiffs concerning the tax consequences of plaintiff-husband's partnership in a firm engaged in underwriting the sale of securities and acting as a broker and dealer in securities. There are several classes of partners in the firm, of which plaintiff is a securities-contributing limited partner. The first suit involved tax years 1957 and 1958 and the partnership agreements respecting those years. In *Phipps* v. *United States*, 188 Ct. Cl. 531, 434 F. 2d 1366 (1969), the court held that plaintiff could exclude from income that portion of the 5% return on his contribution of tax-exempt securities constituting interest which the partnership paid in borrowing capital and pledging the contributed securities as collateral since no specific allocation was found. The present case involves a 1959 agreement and 1960–1963 agreements. It is *held* (1) with respect to the 1959 agreement, since it is the same as that in effect in 1958, that collateral estoppel applies and the court holds again for plaintiff, the Government having shown no change of facts or of applicable law; (2) that the 1960–1963 agreements are different insofar as plaintiff is concerned, and collateral estoppel does not apply; (3) the dominant purpose test in construing Sec. 265(2) of the 1954 Code has been satisfied by direct evidence where the tax-exempt securities are pledged as collateral for the loan; and (4) that the 1960–1963 agreements made a special allocation to taxpayer of the interest expense incurred by the partnership on the loans secured by plaintiff's tax-exempt securities, and this expense (passed on to taxpayer as a credit against his 5% guaranteed interest payment from the partnership) was income to plaintiff within the meaning of Sec. 61(a)(12) of the Code. With regard to tax year 1959, summary judgment is granted to plaintiffs and the case is remanded to the

Syllabus

trial division for determination of the amount of recovery; as to tax years 1960–1963, summary judgment is granted to defendant and the petition on this phase of the claim is dismissed.

Judgments; former adjudication; collateral estoppel.

[1] In income tax refund cases, the doctrine of collateral estoppel is applicable where the material facts involved in the later proceedings are inseparable from those of the earlier case and there has been no change in the legal atmosphere. That the earlier case cited and quoted from a Tax Court opinion which was reversed on appeal does not effect a change in the legal atmosphere sufficient to avoid collateral estoppel where such quoted material consisted of a summary of legislative history, plus a statement of general principles, neither of which was disputed or shown to be incorrect in the appellate opinion.

Judgment ⇐ 576(1)

Judgments; former adjudication; collateral estoppel/*stare decisis*.

[2] Under *Commissioner* v. *Sunnen*, 333 U.S. 591 (1948), collateral estoppel does not automatically carry the interpretation of one written agreement over to another. Thus, where the partnership agreement, on an interpretation of which the court based its earlier opinion, is significantly different from the 1960–63 agreements herein involved, collateral estoppel as well as *stare decisis* do not excuse the court from a re-examination of plaintiffs' tax consequences under the 1960–63 agreements.

Judgment ⇐ 744

Taxes; income tax; deductions; interest on indebtedness; interest relating to tax-exempt income.

[3] Sec. 265(2) of the 1954 Internal Revenue Code prevents a taxpayer who receives tax-exempt interest income from simultaneously reducing his non-exempt income by a deduction for the interest paid on loans incurred or continued to purchase or carry the tax-exempt securities. The use of tax-exempt securities as collateral may characterize the loans as Sec. 265(2) loans. The dominant purpose test in construing Sec. 265(2) is satisfied, and plaintiff is not entitled to a deduction for interest paid on the loans.

Internal Revenue ⇐ 517

Taxes; income tax; income subject to tax; partners and partnerships; partner's distributive share; interest on indebtedness.

[4] Where the partnership agreement provided that plaintiff would be paid an amount equal to 5% per annum of the agreed value of the tax-exempt securities pledged by him, to be used as collateral for loans, to the partnership with the right in the partnership to take as a credit against such 5% amount the interest which the partnership was required to pay on said loans, when the interest expense paid on the loans was deducted from plaintiff's 5% to arrive at the net sum which the partnership owed plaintiff, and where the partnership agreement provided that if any item of income gain,

Opinion of the Court

loss, deduction or credit with respect to pledged securities should be treated for tax purposes as received or incurred by the partnership, each such item should be distributable entirely and solely to the partner who pledged the securities, this was an allocation of the credit to plaintiff constituting income to plaintiff under Sec. 61(a)(12) of the 1954 Code and Treas. Reg. 1.702-1(a) (and implicit in Sec. 702).

Internal Revenue ⇐ 332

Kenneth L. MacCardle, for plaintiff. *Irving H. Bull*, attorney of record. *Dunnington, Bartholow & Miller*, of counsel.

Scott P. Crampton, Assistant Attorney General, for defendant. *Allan C. Lewis*, of counsel.

Before COWEN, *Chief Judge*, DAVIS, SKELTON, NICHOLS, KASHIWA, KUNZIG, and BENNETT, *Judges*.

NICHOLS, *Judge*, delivered the opinion of the court:

This suit arises out of disputes over the tax consequences of Ogden Phipps' partnership agreements in Smith, Barney & Co., for 1959 and for 1960–63. The business was underwriting the sale of securities and acting as a broker and dealer in securities. Lillian B. Phipps is a party solely because she signed joint tax returns with her husband for the 1959–1963 tax years involved. Although the case is presented as a single case for purposes of cross motions for summary judgment, since 1959 involves one partnership agreement and 1960–63 involves another, we deal with each agreement and its tax consequences separately. The IRS has made a disallowance for each year under IRC of 1954, § 265(2). Plaintiff has paid and sues for refunds.

I

The agreement in effect in 1959 has been previously construed in *Phipps* v. *United States*, 188 Ct. Cl. 531, 414 F. 2d 1366 (1969), (hereinafter *Phipps I*), having been the same one in effect in 1958, one of the tax years there involved. We agree with plaintiff that collateral estoppel applies here and hold again for the plaintiff, since in regard to the 1959 agreement the Government has shown no change of facts or appli-

cable law as required by *Commissioner* v. *Sunnen*, 333 U.S. 591 (1948), to lift the ban on relitigating the same issue. *United States* v. *Bayse*, 410 U.S. 441 (1973), is relied on by the Government for this, but the Court concludes at 457:

> In summary, we find this case controlled by familiar and long-settled principles of income and partnership taxation. * * *

The case involved partnership income, but not the deduction of interest on indebtedness incurred to carry tax-exempt securities which was the problem in the first *Phipps* case and again here.

As a matter of interest, we note that the *Phipps* I opinion cites and quotes extensively from *John E. Leslie*, 50 T.C. 11 (1968). The very day before *Phipps* was handed down the Second Circuit reversed *Leslie sub nom*, *Leslie* v. *Commissioner*, 413 F. 2d 636 (1969), *cert. denied*, 396 U.S. 1007 (1970). This does not effect a change in the "legal atmosphere" sufficient to avoid a collateral estoppel because the quoted material from the Tax Court opinion consisted of a summary of legislative history, plus a statement of general principles, neither of which is disputed or shown to be incorrect in the Circuit Judge's opinion.

II

Under *Commissioner* v. *Sunnen*, collateral estoppel does not carry the interpretation of one written agreement over to another, even when the terms are much the same. The 1960–63 agreements are, however, so different insofar as plaintiff is concerned, that even *stare decisis* would not excuse us from a careful re-examination of their tax consequences. The legal issue as to those years, that we consider decisive, is whether IRC of 1954, § 265(2) requires that interest paid by the partnership to banks on loans, secured by pledge of plaintiffs' tax-exempt securities, must be included in plaintiffs' net income. So far as pertinent, the statute reads: "No deduction shall be allowed for— * * * (2) *Interest.* Interest on indebtedness incurred or continued to purchase or carry obligations * * * the interest on which is wholly exempt from the taxes imposed by this subtitle. * * *"

III

Plaintiff, a former general partner, was for the tax years involved here a limited partner of Smith, Barney & Co., a New York firm organized as a limited partnership under New York law and having membership rights through its partners on the New York Stock Exchange (NYSE), the American Stock Exchange, the Philadelphia-Baltimore Stock Exchange, the Midwest Stock Exchange, and the Pacific Coast Stock Exchange. There were several classes of partners in the firm: (1) ordinary general partners, (2) five "deep pockets" general partners (who underwrote all losses in excess of $1,000,000), (3) retired limited partners (former general partners with guaranteed retirement incomes of at least $18,000 annually), (4) cash-contributing limited partners, (5) securities-contributing limited partners (of whom Phipps, plaintiff here, was one), and (6) partners who contributed stock exchange memberships.

It appears that Mr. Phipps' contribution to the partnership for the years in question was primarily a personal note secured by pledge of securities for the firm's use. NYSE Rule 325 (which limits members' amount of business and available customer loan capacity to 2000 percent of the members' "net capital") creates a situation where member firms are always in need of additional working capital. Thus, in addition to the general capital and limited capital contributions by the partners, such as Phipps' limited capital, the firms also seek various ways to include partners' non-capital, individual trading accounts' assets in "net capital"—without otherwise depriving individual members of legal and beneficial ownership of these individual trading accounts. (*Shearson, Hammil & Co.* v. *State Tax Commission*, 19 App. Div. 2d 245, 241 N.Y.S. 2d 764 (1963), *aff'd*, 255 N.Y.S. 2d 657 (1964), which exempted these trading accounts from the New York Unincorporated Business Tax, provides additional information on the operation of these trading accounts.)

Mr. Phipps' capital contribution was supplied in the form of a Limited Capital Note—a demand, non-negotiable note—secured at 100% face value by readily marketable securities. In Phipps' case, tax-exempt securities (such as Section 103 state and municipal bonds) were used. These securities were

placed in a pledge account with the firm. Phipps was required to maintain at least 100% face value of his note in securities with an equal fair market value and also meeting a 90% "capital requirements value" as defined by NYSE rules for measuring "net capital". Any appreciation or other excess above this two-fold valuation test could be withdrawn. The partnership paid Mr. Phipps 5% per annum on his capital contribution. The partnership paid interest on bank loans secured by plaintiffs' tax-exempts as follows:

1960	$10, 183. 22
1961	9, 125. 00
1962	9, 000. 00
1963	9, 000. 00

The partnership deducted these amounts from the 5% payments to Mr. Phipps, paying him only a net figure.

The provisions of the partnership agreement we consider decisive, Articles IV, V and XI of the 1960 partnership agreement, are attached hereto as an appendix. They were in effect for the tax years 1960–1963, inclusive. A limited partner such as Phipps was to be "paid" 5% on the value of his note, as an expense of the business, whether or not earned, plus an additional 1% if earned. He remained owner of the pledged securities and entitled to the income resulting from them. The partnership might pledge the securities to secure its own obligations. The partnership could take as a credit on the 5% and the 1% if earned, the interest it was required to pay on loans secured by the pledged securities. If any item of "income, gain, loss, deduction or credit" with respect to pledged securities should be treated for tax purposes as received or incurred by the partnership, each such item should be "distributable entirely and solely to the partner who pledged" the securities. This last provision, in Article XI (a) had no counterpart in the agreement construed in our previous *Phipps* I decision.

It is defendant's interpretation of the present agreement that the partnership considered it was paying Mr. Phipps 5% at all events, either directly or in the form of a credit for the interest to banks. Since the arrangement permitted Mr. Phipps to contribute his tax-exempts to the partnership

working capital, yet still enjoy their fruits, it was only fair he should pay the cost of the bank loans that made the arrangement possible. Had he chosen, as he might have, to contribute cash, there would have been no fruits, and on the other hand, no interest to the banks. The bank interest was incurred to preserve the fruits, *i.e.*, for Mr. Phipps' benefit. It was therefore clearly expected that interest payments made to carry the pledged securities should not fall on the partnership or on the general partners who shared the partnership profit (except the 1%) and loss, but solely on the limited partner who was enjoying the aforementioned fruits.

In *Phipps* I, we held for plaintiff because, assuming *arguendo* that § 265(2) mandated a disallowance of the interest paid the banks, we did not see why the burden of the disallowance fell on the plaintiff rather than on the partners who enjoyed the profits and bore the losses. Here we are given a reason why.

IV

We considered § 265(2) in *Illinois Terminal R.R.* v. *United States*, 179 Ct. Cl. 674, 375 F. 2d 1016 (1967). We reasoned that it was not enough for a § 265(2) disallowance of the interest deduction that a taxpayer coincidentally held tax-exempt securities. There must be a nexus between the interest payments and the securities held, a "relationship". The purpose, or the dominant purpose if there is more than one, for incurring the debt must be to carry the securities. This purpose test has been applied by other courts. *Leslie* v. *Commissioner*, *supra*; *Wynn* v. *United States*, 288 F. Supp. 797 (E.D. Pa. 1968), *aff'd per curiam*, 411 F. 2d 614 (3d Cir. 1969), *cert. denied*, 396 U.S. 1008 (1970); *The Wisconsin Cheeseman* v. *United States*, 388 F. 2d 420 (7th Cir. 1968). In the latter two cases, as here, the securities were used as collateral for the loans, obviously a close and intimate relationship. Phipps, evidently a wealthy man, could have contributed working capital in several different ways, and he enjoyed that option under the Articles too. The selection of the tax-exempts obviously had a tax purpose. The case is, in that aspect not nearly as close as *Illinois Terminal*.

Rev. Proc. 72–18 (Sec. 3.03), 1972–1 Cum. Bull. 740, says that:

> Direct evidence of a purpose to *carry* tax-exempt obligations exists where tax-exempt obligations are used as collateral for indebtedness. * * * (Emphasis in original.)

In the presence of direct evidence, it is not necessary, as it was in *Illinois Terminal R.R. Co.*, *supra*, to search and analyze the record for indirect evidence.

V

If Mr. Phipps had pledged ordinary securities, whose interest was taxable, we believe under Article V he would have been deemed to have received as income the full 5% without reduction. He was entitled to be:

> "*paid* for each full year * * * an amount equal to 5% per annum." (Emphasis supplied.)

By Treasury Regulation on Income Tax, § 1.702–1(a):

> * * * Each partner is required to take into account separately in his return his distributive share, whether or not distributed, of each class or item of partnership * * * gain, loss, deduction, or credit * * * [including] * * *
>
> * * * * *
>
> (8)(i) * * * any items of income, gain, loss, deduction, or credit subject to a special allocation under the partnership agreement which differs from the allocation of partnership taxable income or loss generally.
>
> * * * * *

The interest payments to the banks are called "credits" against the limited partner's 5%, in Article V, and Article XI (a) clearly tracks the above quoted "special allocation" provision. The washing out of an offset claim as part of "payment" is not new or unfamiliar to the tax law. *See, e.g.*, *Commissioner* v. *Hansen*, 360 U.S. 446 (1958), (in which an item is deemed accruable under the "all events" test if at all events it will either be paid in cash or offset against anticipated future liabilities). *See*, also, *Lawyers Title Guaranty Fund* v. *United States*, 508 F. 2d 1 (5th Cir., 1975).

By IRC of 1954, § 61(a)(12), the discharge of indebtedness is includable as income.

Plaintiff has furnished an affidavit issued by Smith, Barney & Company's then Chief Accountant describing its accounting and tax reporting procedure. Even if we were to accept the affidavit in its entirety as true, that would not change the result in this case. Although the affidavit indicates that the partnership did not report on its returns for the subject years any amount of the interest deduction as having been specially allocated to the plaintiff, such an allocation is in fact what actually occurred even though not reported as such. When the interest expense paid on loans secured by plaintiff's securities was deducted from plaintiff's 5 percent per annum to arrive at the sum which the partnership owed plaintiff, this was the allocation. This subtraction was provided for in the partnership agreement. The affidavit, incidentally, acknowledges this subtraction in paragraph eight thereof. The erroneous treatment by the partnership of the amounts in controversy cannot change the legal effect under section 265(2) of the express terms of the partnership agreement as shown by the above analysis.

Having the full 5% imputed to him, Mr. Phipps would, of course, in the ordinary case have the interest deduction imputed to him also, as Article XI (a) clearly requires, and he could take it as a deduction on his return.

Since the interest deduction, if allowable, would belong to Mr. Phipps, it is clear the burden of any disallowance would fall on him also. We have shown under Part IV that the interest here involved was paid to "carry" the tax-exempts within the meaning of § 265(2). It follows that Mr. Phipps is taxable for the full 5% without deduction for the interest, with respect to his 1960–63 tax years, the 5% being made up of the sums actually paid him and "credit" taken on account of his obligation to relieve the partnership of the interest paid the banks.

In regard to tax year 1959, summary judgment is granted to plaintiff and the case is remanded to the trial division for a determination of recovery pursuant to Rule 131(c), since the record does not adequately state the full amount of back taxes, penalties, and interest to be refunded.

In regard to tax years 1960–63, summary judgment is granted to defendant and the petition is dismissed.

SKELTON, *Judge*, joined by BENNETT, *Judge*, concurring in part and dissenting in part:

I concur with that part of the court's opinion that holds that plaintiff is entitled to a refund of the income taxes claimed by him for 1959 on the basis of collateral estoppel by reason of our decision in *Phipps* v. *United States*, 188 Ct. Cl. 531, 414 F. 2d 1366 (1969) (hereinafter *Phipps I*). In fact, I think plaintiff is entitled to recover the 1959 taxes on the merits, because *Phipps I* was correctly decided. However, I disagree with that part of the opinion that denies to plaintiff a refund for the claimed taxes for 1960, 1961, 1962, and 1963. In my opinion, the plaintiff is entitled to a refund of such taxes for those years under the doctrine of *stare decisis*, as well as on the law and the facts on the merits of the case, as shown below.

As to *stare decisis*, both plaintiff and defendant agree that there is no difference between plaintiff's claims for 1960–1963 and his claim for 1959. In defendant's brief, in support of its motion for summary judgment, we find the following statements:

> The situation for 1960 through 1963 is not different in substance from that for 1959. [*Id.* at 32.]
>
> * * * * *
>
> There is no difference between taxpayer's claims for 1960 through 1963 and his claim for 1959. [*Id.* at 36.]

In my opinion, the defendant is correct in saying there is no difference between plaintiff's claims for 1960 through 1963 and his claim for 1959. The court has allowed plaintiff's claim for 1959 on the basis of *Phipps I* because of collateral estoppel. By such action, the court has affirmed and approved its holding in *Phipps I*. Even if collateral estoppel is not applicable to plaintiff's claims for 1960–1963 because of minor changes in the partnership agreements for those years, *stare decisis* is applicable. Consequently, since the claims for 1960–1963 are the same as those for 1959, which the court decides in favor of plaintiff because of *Phipps I*, the plaintiff

is also entitled to recover for the years 1960–1963 on the doctrine of *stare decisis*. This is true because *Phipps I* has not been overruled.

But we do not have to stop here. The plaintiff is entitled to recover on the merits the refund he claims for the years 1960–1963. The court has erroneously denied him recovery of the refund for those years on the basis of Section 265(2) of the Internal Revenue Code of 1954 which provides that no deduction shall be allowed for interest on indebtedness incurred or continued to purchase or carry obligations, the interest on which is wholly exempt from taxes. In this case, no one contends that plaintiff has borrowed any money to *purchase* tax exempt securities. Consequently, the only question is whether or not he has borrowed money to *carry* tax exempt securities. The word "to" in the statute has been construed to mean "for the purpose of" (purchasing or carrying tax exempt securities). *See Phipps* v. *United States*, *supra* at 539, 414 F. 2d at 1372. This question has already been decided in favor of the plaintiff in *Phipps I* as follows:

> Taxpayer has not incurred any indebtedness to continue to carry his tax exempt securities, the essence of section 265(2). The loan agreement was made by the partnership for its benefit, to obtain working capital. The interest deduction, if denied, should affect the partnership's profits and all partners, proportionately. Section 265(2), in its present form, cannot be stretched to encompass the instant case. On the unique facts as stipulated before us, plaintiff is entitled to recover. [188 Ct. Cl. at 543, 414 F. 2d at 1374.]

We are bound by this decision under the doctrine of *stare decisis*. However, we do not have to rest our decision on that doctrine alone, even though it appears to be conclusive in this case.

Other courts that have considered the problem before us have stated that before a tax can be imposed on a taxpayer by reason of Section 265(2) of the Code, it must be shown that money borrowed by the taxpayer was for the purpose of *carrying* the tax exempt securities. This question was considered by the Tax Court in the case of *R. B. George Machinery Co.*, 26 B.T.A. 594 (1932), in connection with the predecessor of Section 265(2) containing identical language.

There the taxpayer had sold machinery to the State of Texas but had to accept warrants bearing seven percent interest in payment because the State did not have the money to pay for the machinery. He borrowed money from a bank at seven percent interest and pledged the warrants as security. Later, taxpayer deducted the interest he paid the bank from his income tax. The Commissioner of Internal Revenue disallowed the deduction, claiming, as here, that the money borrowed from the bank was for the purpose of carrying the tax exempt State warrants. The Tax Court decided the case in favor of the taxpayer, saying:

> The parties have proceeded on the theory that the money obtained from the bank by petitioner was a loan, with the deficiency warrants of the state and its political subdivisions being hypthecated (sic) as security therefor. This we think is the correct approach. Prior to the transaction in question the various state and municipal obligations had become the property of petitioner and were fully paid for by it, as they represented payments to petitioner for machinery sold to the state and its subdivisions. It is quite apparent, then, that the money advanced to the petitioner on the warrants did not represent "indebtedness incurred or continued to *purchase* * * * obligations or securities * * * the interest upon which is wholly exempt from taxation * * *." This brings us to the real question, and that is, Was the interest here in controversy interest paid on "indebtedness incurred or continued * * * to *carry* obligations or securities * * * the interest upon which is wholly exempt from taxation?" [Emphasis in original.]
>
> * * * * *
>
> The statute was manifestly designed to prevent the purchaser of tax-exempt securities from deducting interest paid for borrowed money, which money was used to acquire securities the interest on which could not be taxed by the Federal Government. *Denman* v. *Slayton*, *supra*. [282 U.S. 514 (1931).] We think the exception in the statute should not be construed more broadly than to effect its obvious purpose. *It was not intended to penalize legitimate business or to deny to it the right to deduct interest paid for borrowed money, which money was used for the purpose of carrying on its regular functions. The warrants held by petitioner were received in payment for goods sold and they were apparently given because the state or its subdivisions could*

not at the time pay cash. They in no true sense of the word represented investments by petitioner, as it preferred at all times to get its cash out of them. The fact that in making the loan the petitioner hypothecated the warrants does not alter the fact as stipulated that the cash as borrowed was for the purpose of operating its business. *It was not used to buy or secure the warrants in any sense of the word.*

It follows that interest paid by petitioner in the amount of $13,543.04 constitutes a proper deduction. [26 B.T.A. at 597–98.] [Emphasis supplied.]

In a similar case, the Tax Court held in *Sioux Falls Metal Culvert Co.*, 26 B.T.A. 1324 (1932):

> The remaining question, as to whether amounts paid to the bank in the taxable years represent interest paid on indebtedness incurred or continued to carry tax-exempt securities, has heretofore been decided in *R. B. George Machinery Co.*, 26 B.T.A. 594, where we held that warrants, similar to those involved in the instant proceeding, received in payment for machinery and used as security for a loan, were received and carried as an incident to petitioner's business, and that the interest paid was deductible. Upon authority of our decision in that case we hold that the petitioner is entitled to deduct as interest expense the amounts paid to the Minnehaha National Bank. [*Id.* at 1327–28.]

All of the cases that have passed on the question before us, including those cases where the decisions have been adverse to the taxpayers, the courts have held that there must be a *direct relationship* between the money borrowed and the *carrying* of the securities before the taxpayer will be denied the interest deduction. For instance, in *Leslie* v. *Commissioner*, 413 F. 2d 636 (1969), the court said:

> Although simple to state, the "purpose" test is difficult to apply in practice. Certainly where borrowed funds are used directly to purchase tax-exempt securities, there can be no dispute as to the application of the statute. Drybrough v. C. I. R., 376 F. 2d 350 (6th Cir. 1967). However, where business reasons not related to purchase of tax-exempt securities dominate the incurring of indebtedness, taxpayer is entitled to deduct the interest on the indebtedness. Wisconsin Cheeseman, Inc. v. United States, 388 F. 2d 420 (7th Cir. 1968). The court in *Wisconsin* refused to accept the argument that "a

reasonable person would sacrifice liquidity and security by selling municipals in lieu of incurring mortgage debt to finance a new plant." 388 F. 2d at 423. Thus as to the taxpayer's borrowing to build a new plant, the loan for which was secured by a mortgage on the real estate, the court did not find a sufficiently direct relationship. However, the court disallowed the deduction with respect to the taxpayer's seasonal bank borrowings, the collateral for which was tax-exempt securities.

* * * * *

* * * A more appropriate interpretation of Section 265(2) is whether or not there is a business "purpose" to purchase or carry obligations the interest on which is exempt, and to incur indebtedness therefor. Cf. Wynn v. United States, 288 F. Supp. 797 at 802 (E.D. Pa. 1968), aff'd per curiam 411 F. 2d 614 (3d Cir. May 14, 1969). [*Id.* at 639–40.]

In *Wisconsin Cheeseman, Inc.* v. *United States*, 388 F. 2d 420 (7th Cir. 1968), the court held that there must be a direct relationship between the debt and the carrying of the bonds. The court said:

> In our view, the taxpayer is not *ipso facto* deprived of a deduction for interest on indebtedness while holding tax-exempt securities. The Government has not convinced us that interest deduction can be allowed only where the taxpayer shows that he wanted to sell the tax-exempt securities but could not. For example, Congress certainly did not intend to deny deductibility to a taxpayer who holds salable municipals and takes out a mortgage to buy a home instead of selling the municipals. As the Court of Claims stated in Illinois Terminal Railroad Company v. United States, 375 F. 2d 1016, 1021 (Ct. Cl. 1967):
>
> > "It is necessary [for the Commissioner] to establish a sufficiently direct relationship of the continuance of the debt for the purpose of carrying the tax-exempt bonds."
>
> This construction flows from the use of "to" in Section 265(2). * * * [*Id.* at 422.]

In that case the taxpayer owned tax-exempt securities which it pledged as security for short term loans. The court properly held that there was a direct connection between the debt and carrying the securities and denied the interest de-

duction on the debt by reason of Section 265(2) of the Code. However, the taxpayer borrowed additional money to build a plant during the time it owned the tax-exempt securities, which debt was secured by a mortgage on real estate. The IRS took the position that the taxpayer should have sold the tax-exempt securities to obtain money to build the plant and for that reason concluded that the mortgage secured debt was for the purpose of carrying the securities, and, accordingly, denied a deduction for the interest on the debt. The court held in favor of the taxpayer, saying that section 265(2) was not a mechanical formula and if the debt was for a legitimate business purpose and had an insufficient relationship to the holding of the securities, the mortgage deductions must be allowed. In this connection the court said:

> * * * Section 265(2) was not intended to operate as a a "mechanical rule." Here we are not applying a mechanical rule but are insisting upon a connection between the tax-exempt securities and the loans before interest deductibility is disallowed.
>
> * * * * *
>
> * * * *Business reasons dominated the mortgaging of the property.* Therefore, we are unwilling to accept the Commissioner's view that taxpayer should have liquidated municipals instead of obtaining a real estate mortgage loan. *There is an insufficient relationship between the mortgage indebtedness and the holding of the municipal bonds to justify denial of deduction of the mortgage interest.* For non-deductibility, we have seen that *the Commissioner must establish a sufficiently direct relationship between the debt and the carrying of the tax-exempt bonds. That has not been done as to the mortgage, so that the mortgage interest deductions must be allowed under Section 163(a) of the Internal Revenue Code.* [*Id* at 423.] [Emphasis supplied.]

The foregoing opinion was quoted with approval by the court in *Wynn* v. *United States*, 288 F. Supp. 797 (E.D. Pa. 1968), *aff'd per curiam*, 411 F. 2d 614 (3d Cir. 1969), when it held:

> On appeal, the Court of Appeals held that the test to be applied was not solely whether the taxpayer *held* tax exempts at the time he incurred the obligation

the interest on which he sought to deduct, but rather the Commissioner had to establish a reasonably close relationship between the incurring of such obligation and the *purpose* "to purchase or carry" the tax exempts. * * *

* * * [T]he Court found that there was insufficient relationship between borrowing for a one-time, large capital expenditure, of a kind usually financed by mortgage secured borrowing and the continued holding of tax exempt securities—especially when selling off the securities and using the proceeds for the plant expansion would have seriously jeopardized taxpayer's liquidity position. With respect to the mortgage interest, the Court held that:

"* * * Business reasons dominated the mortgaging of the property. Therefore, we are unwilling to accept the Commissioner's view that taxpayer should have liquidated municipals instead of obtaining a real estate mortgage loan. There is an insufficient relationship between the mortgage indebtedness and the holding of the municipal bonds to justify denial of deduction of the mortgage interest. * * *" [Emphasis in original.] [*Id.* at 800.]

In that case, the court went on to say:

That the "purpose" or "relationship" tests are to be applied to the intent to purchase or carry the tax exempt securities themselves, rather than to obtain the interest is further borne out by the legislative history. * * * Thus, even where a taxpayer might earn tax exempt interest with the proceeds of borrowing, *if the money was not borrowed for the purpose of purchasing or carrying tax exempt bonds he would get the double advantage of both a tax deduction for the interest expense and no tax on the interest earned.*[7]

[7] The Commissioner, too, has ruled that where a business borrowed money for business purposes, and during a delay before the actual expenditure was made invested in tax exempt securities, the taxpayer was not denied a deduction for the interest on the borrowed funds. Rev. Rul. 55-389, C.B. 1951-1, 276. [Emphasis supplied.] [*Id.* at 802.]

In *Illinois Terminal RR Co.* v. *United States*, 179 Ct. Cl. 674, 375 F. 2d 1016 (1967), in an opinion written by Commissioner Marion T. Bennett (now Judge Bennett of this court) we held:

* * * It is necessary to establish a sufficiently direct

relationship of the continuance of the debt for the purpose of carrying the tax-exempt bonds.

If the loan was needed to sustain plaintiff's business operation rather than its ownership of tax-exempt securities, the prohibitory features of section 265(2) will not apply. R. B. George Machinery Co., 26 B.T.A. 594 (1932); *Sioux Falls Metal Culvert Co.*, 26 B.T.A. 1324 (1932). * * * [Emphasis supplied.] [*Id.* at 683, 375 F. 2d at 1021.]

This brings us to the fact of the instant case. In *Phipps* I we stated:

> Taxpayer has not incurred any indebtedness to continue to carry his tax exempt securities, the essence of section 265(2). The loan agreement was made by the partnership for its benefit, to obtain working capital. * * * [188 Ct. Cl. at 543, 414 F. 2d. at 1374.]

The same facts exist in the instant case. The loan was made by the partnership for the legitimate business purpose of obtaining working capital in order to comply with the stock market regulations. The loan had nothing whatever to do with carrying plaintiff's tax-exempt securities. The plaintiff had nothing to do with making the loan. Furthermore, the partnership did not own the bonds and was not entitled to the tax-exempt interest derived therefrom. These facts fit squarely within the foregoing authorities to the effect that where the loan is made for a legitimate business purpose without any direct relationship with the carrying of tax-exempt securities, the interest deduction must be allowed. That is the situation in this case.

In the instant case, the plaintiff was a wealthy man, which is acknowledged by the court's opinion. When he showed that he owned the securities free of debt and that he did not borrow any money with the securities as collateral, the burden was on the Commissioner "to establish a sufficiently direct relationship between the debt [of the partnership] and the carrying of the tax-exempt bonds." The courts so held in *Wisconsin Cheeseman, Inc.* v. *United States*, *supra*, and *Wynn* v. *United States*, *supra*. The Commissioner wholly failed to discharge this burden in this case.

While Section 265(2) of the Code as interpreted and applied by the foregoing authorities is decisive of this case in

favor of the plaintiff, the defendant has confused the issue by its "allocation" argument. It contends by hypothetical, conjectural and circuitous reasoning that somehow paragraphs IV, V, and XI(a) of the partnership agreements in force for the years 1960–1963 allocate the interest paid by the partnership on its loan in such a way that plaintiff should be deemed to have reimbursed the partnership for the interest on such loan and by reason thereof the loan was made to *carry* plaintiff's tax-exempt securities. This argument is made notwithstanding the fact that plaintiff owned the securities outright, free of debt, and had nothing to do with making the loan, and even though the partnership created the debt for a legitimate business purpose (*i.e.*, to get working capital) that had no direct relationship to the carrying of plaintiff's tax-exempt securities. This same allocation argument was made by defendant in *Phipps I*, which was rejected by the court. In that case paragraphs IV and V involved here were in all material respects present in the agreements for 1958 and prior years. The only new paragraph in the agreement in the instant case on which defendant relies for its allocation argument is XI(a) which is as follows:

> (a) If any item of income, gain, loss, deduction or credit in respect of particular securities or other property placed by a Partner in his Pledge Account should for tax purposes be treated as received or incurred by the Partnership, each such item shall be distributable entirely and solely to the Partner who so pledged such securities or other property.

The defendant says that paragraph XI(a), together with paragraphs IV and V of the agreement, required plaintiff to reimburse the partnership for the interest on its loan, and, therefore, the loan was made to *carry* plaintiff's tax-exempt securities. I cannot accept this kind of nebulous reasoning, especially when it is shown conclusively that plaintiff had nothing to do with the loan, did not need it, did not in fact reimburse the partnership for the interest, and there was no direct relationship between the loan and carrying the securities. Furthermore, the loan was made for a legitimate business purpose to the partnership.

Opinion of Judge Skelton Concurring and Dissenting in Part

In my opinion, paragraph XI(a) does not allocate the interest on the partnership loan to the plaintiff. That paragraph must be considered in connection with the pertinent part of paragraph IV, which provides as follows:

> Each Partner shall pay all taxes, assessments or other charges upon or with respect to any securities or property in his Pledge Account and with respect to any transactions therein (whether upon liquidation thereof, or otherwise) or upon or with respect to the income therefrom or distributions thereon or the gain or loss in value thereof inuring to him.

When this is done, it is clear that the meaning of paragraphs XI(a) and IV is to require any partner who placed securities or other property in his Partnership Pledge Account to pay any loss, deduction, taxes, assessments, or other charges upon or with respect to any of such securities or other property even though the same should be treated as incurred by the partnership. For instance, the plaintiff here could have contributed real estate rental property instead of his note secured by the tax-exempt securities. In that case, the above provisions would have required him to pay real estate taxes, repair bills, fire losses, insurance premiums, and perhaps utility bills and charges of like character due on the pledged property, even though the bills were presented to the partnership as though it was the owner (*i.e.* "treated as incurred by the partnership"). The same is true with respect to plaintiff's tax-exempt securities here. Under this analysis, the meaning of these paragraphs appear to be quite simple and easily understood, although at first blush they appear to be very complicated. To carry the analysis further, the indicated paragraphs entitle the partner to any gain, income, or credit on or to the pledged property, even if paid to the partnership. For example, on pledged real estate rental property, the partner would be entitled to any increase in value, the rent paid by tenants, depreciation deduction, etc. The same is true with respect to gain or income on plaintiff's tax-exempt securities in the instant case.

It will be noted that there is nothing in these paragraphs or in paragraph V that requires the plaintiff to *reimburse* the partnership for any interest paid by the partnership on

its business loans where a partner's pledged property is used as security or collateral. Furthermore, there is nothing in these paragraphs that *allocated* such interest to the plaintiff. Had the parties so intended, it would have been easy to provide for it. When the defendant construes these paragraphs, along with paragraph V, to mean that the interest was allocated to the plaintiff and that they required the plaintiff to reimburse the partnership for the interest paid by it to a bank on a business loan under the circumstances of this case, it appears that defendant is reading something into these paragraphs that is not there.

As a matter of fact, the affidavit of Smith, Barney and Company, accountants, shows that the partnership did not report on its returns for the years in question any amount of interest deduction that had been allocated to the plaintiff. This is proof that the parties did not contract for any such allocation and did not intend to do so. The defendant appears to have injected its allocation theory into this case as an "afterthought" idea that the parties never intended or even thought about. It is completely unrealistic and contrary to the facts.

I would grant plaintiff's motion for summary judgment and enter judgment for the plaintiff for a refund of the taxes for 1959–1963, together with interest, and remand the case to the trial judge for a determination of the amount of recovery pursuant to Rule 131(c)(2); and I would deny defendant's cross-motion for summary judgment.

APPENDIX

IV.

Partners' Pledge Accounts

Partnership's Rights in Pledged Property

The Partnership, as holder of Capital Notes or Limited Capital Notes and as pledgee of the property in the Pledge Accounts of the Partners shall have the following rights with respect to such property (without limiting any rights it may otherwise have as such holder and pledgee):

(1) Securities in registered form in a Partner's Pledge Account may be held by the Partnership in such

form as it may deem advisable, either in its own name or in the name of a nominee or nominees or in such Partner's name, in good delivery form.

(2) In the event that any Capital Note or Limited Capital Note of any Partner is not paid when due, the Partnership shall have the right to liquidate, to the extent that a majority in interest of the General Partners shall deem advisable, the property then in such Partner's Pledge Account, and to apply the proceeds of such liquidation, and/or any cash constituting part of the property in his Pledge Account, in payment, in whole or in part of the then unpaid principal amount of the Capital Notes or Limited Capital Notes of such Partner that are due. Any proceeds of liquidation not applied as aforesaid shall remain property in such Partner's Pledge Account, subject to the provisions of this Article. Any such liquidation may be effected by sale for cash, upon any exchange or in the over-the-counter market, or at any other public or private sale, without advertisement or notice, all as the Partnership in its sole discretion may determine. The purchaser of any property at any such sale shall take the same free of any right of redemption and of any other right or claim on the part of the Partner whose Pledge Account is being liquidated, all of which rights and claims are hereby waived and released. The Partnership or any other Partner may be the purchaser at such a sale only if the sale is made on an exchange. The net proceeds of any such liquidation sale shall be the proceeds remaining after payment of all expenses of such sale. If the Pledge Account of a Limited Partner is liquidated in full and if the Limited Capital Notes of such Limited Partner are not paid in full from the proceeds of such liquidation or otherwise, the Partnership may proceed against such Limited Partner to enforce payment of such Limited Capital Notes.

(3) The Partnership shall also have the right, without notice, to pledge, re-pledge, hypothecate or rehypothecate any or all securities or other property in any Partner's Pledge Account (separately or in common with other securities or any other property) to secure indebtedness of the Partnership in any amount (whether larger or smaller than the unpaid principal amount of the outstanding Capital Notes or Limited Capital Notes of such Partner) and without retaining a like amount of securities in the Partnership's possession or control; provided, however, that in the event that the Partnership is unable to release or return any

securities or other property to such Partner when he shall be entitled to, and shall make demand for, such release or return, because of any such pledge, re-pledge, hypothecation or re-hypothecation, the market value of such securities or other property as of the date such demand is rightfully made shall be ascertained and such securities or other property shall be deemed to have been applied to the payment of the principal amount of the outstanding Capital Notes or Limited Capital Notes of such Partner, and if there shall be any excess of the market value, as of such date, of such securities or other property remaining after payment in full of all outstanding Capital Notes or Limited Capital Notes of such Partner, the Partnership shall promptly pay to such Partner an amount in cash equal to such excess. Such Partner's right to such securities or other property shall be deemed satisfied to the extent of the value of the securities or other property so applied or paid.

(4) The amount by which the principal amount of any Capital Note or Limited Capital Note of any Partner shall have been paid or satisfied, by use or application made or deemed to have been made of property in his Pledge Account or proceeds of any liquidation of property in his Pledge Account, or by any other payment by him or otherwise, shall be credited to such Partner's individual account in the case of a General Partner or to cash capital contribution in the case of a Limited Partner, reducing his capital contribution represented by notes, in the same manner as a voluntary payment of such Capital Note or Limited Capital Note.

(5) Each Partner shall pay all taxes, assessments or other charges upon or with respect to any securities or property in his Pledge Account and with respect to any transactions therein (whether upon liquidation thereof, or otherwise) or upon or with respect to the income therefrom or distributions thereon or the gain or loss in value thereof inuring to him.

Partner's Rights in Pledged Property

Subject only to the pledge thereof and the rights of the Partnership therein as pledgee, as provided in this Article and in any Capital Notes or Limited Capital Notes, the property from time to time in a Partner's Pledge Account shall, until and unless liquidated by the Partnership in accordance with the provisions of this Article, remain the property of the Partner pledging the same, and he shall have and retain full legal and beneficial ownership thereof

and, without limiting the generality of the foregoing, shall have the benefit of any increase and bear the risk of any decrease in value and shall have the sole right to any and all income therefrom and distributions thereon. Such Partner, except when any of his Capital Notes or Limited Capital Notes are in default, shall have the right to direct the voting and exercise of other rights and privileges pertaining to the property in his Pledge Account, to direct sales of any such property and to direct purchases of any property from any cash in his Pledge Account (subject, in the case of a Limited Partner, to the right of a majority in interest of the General Partners to disapprove any such proposed purchase); provided, however, that the net proceeds of any such sale and any property so purchased shall be placed in such Partner's Pledge Account. Any Partner may at any time withdraw any property in his Pledge Account upon substitution therein of property (whether cash or other property) having a capital requirements value at least equal to the capital requirements value of the property to be released, provided that any property thus substituted by a Limited Partner must be satisfactory to the Partnership. Any property withdrawn from a Partner's Pledge Account pursuant to any provision of these Articles shall become the absolute property of such Partner and shall no longer be subject to any pledge hereunder. So long as no Capital Note or Limited Capital Note of a Partner is in default, there shall be released from such Partner's Pledge Account and paid over to him all interest and dividends (except dividends payable in securities and except partial or complete liquidating dividends) received with respect to property in such Partner's Pledge Account. When all Capital Notes or Limited Capital Notes of a Partner are paid in full, the Partnership shall have no right or interest of any kind in such Partner's Pledge Account or any property therein.

V.

Interest on Capital

Interest on Limited Capital Contributions in Cash

The limited capital contributions in cash (not including cash in Limited Partners' Pledge Accounts) shall bear interest at the rate of 5% per annum, payable quarterly during

any continuance of the partnership, to be charged to and paid by the Partnership, whether or not earned, as an expense of the business.

Interest on Limited Capital Contributions in Notes

Each Limited Partner who has contributed a Limited Capital Note or Notes to the capital of the Partnership shall be paid for each full year that he is a Limited Partner an amount equal to (or for any period of less than a full year, at the rate of) 5% per annum on the agreed value (as stated in Article II) of such Note or Notes while the same are outstanding; provided, however, that the Partnership may take as a credit against such amount, and against the additional amount, if any, payable in accordance with the fourth paragraph of this Article V, the interest which it is required to pay for such period on any loan or loans secured by property placed in such Limited Partner's Pledge Account. Any amount paid to a Limited Partner in accordance with the provisions of this paragraph shall be charged to and paid by the Partnership, whether or not earned, as an expense of the business.

Interest on General Capital

The general capital contributions shall bear interest at the rate of 5% per annum, payable at the end of each calendar year during the term of the Partnership, but only to the extent that there shall be net profits for such year sufficient to pay the same as provided in Article VIII.

Additional Interest on Limited and General Capital

To the extent that the net profits of the Partnership for any calendar year, determined in accordance with Article VIII, exceed by more than $150,000 the amount necessary to pay interest on general capital contributions as hereinabove provided, additional interest in an amount not exceeding 1% per annum shall be paid on the limited and general capital contributions in cash and on the agreed value (as stated in Article II) of Limited Capital Notes contributed by a Limited Partner. Such additional interest for any calendar year shall be paid at the end of such year or as soon thereafter as convenient and shall be paid without priority of limited capital over general capital and general capital over limited capital.

* * * * *

Appendix
XI.

General Accounting Provisions

Books

Appropriate books of account shall be kept, and each Partner, whether Limited or General, shall have access to all books, records, and accounts of the Partnership.

Statements of Accounts

The accounts of the Partnership shall be ascertained and determined as of the close of business on the last day of each month during the continuance of the Partnership, and as of the close of business on December thirty-first of each year the books of account of the Partnership shall be closed and shall show the status of the accounts of the Partnership, including net profits and net losses, and shall also show the amounts of the general and limited capital contributions as they then stand on the books of the Partnership.

Calculations of Capital

The amount of the capital contribution of any Partner, at any time, shall be the amount of the capital contribution of such Partner set forth in Article II hereof, plus the amount (determined as provided in Articles II and III) of any additional capital contribution made since the date of these revised Articles and less any part of such contribution which shall have been withdrawn by such Partner since such date.

Interest payable to a Partner on his capital contribution shall be computed upon the amount of capital contribution standing to his credit upon the books of the Partnership from time to time during the year.

Except with respect to the distributive interests of withdrawn Partners determined in accordance with the provisions of Article XXI, the accounts of the Partnership, as ascertained and determined as of the end of each month and as of the end of each calendar year, shall be conclusive upon each Partner unless he shall make objection to the same in writing, delivered to the Partnership within sixty (60) days after the close of the month or the year for which such account is made, and, in the absence of such written objection, the correctness of such account shall not thereafter be questioned by any Partner or by his legal representatives.

Except as otherwise expressly provided in these Articles, in determining the accounts of the Partnership for all pur-

poses, the assets and liabilities of the Partnership may be taken at such valuations as a majority in interest of the General Partners shall determine, and the Partnership may, but shall not be required to, set up reserves against doubtful accounts and contingent and unliquidated liabilities, including the indebtedness of any Partner to the Partnership.

Income Tax Allocations

For income tax purposes, and particularly for the purpose of Subchapter K of Chapter 1 of the Internal Revenue Code of 1954—

(*a*) If any item of income, gain, loss, deduction or credit in respect of particular securities or other property placed by a Partner in his Pledge Account should for tax purposes be treated as received or incurred by the Partnership, each such item shall be distributable entirely and solely to the Partner who so pledged such securities or other property.

(*b*) Each item of Partnership income, gain, loss, deduction or credit in respect of each Partnership Investment or Corporate Affiliate shall respectively be distributable among the Partners as provided in said Article XII.

(*c*) If and to the extent that any payment treated under these Articles as an expense of the business or any payment designated under these Articles as interest, whether or not treated as an expense of the business, is for tax purposes treated as a distribution of partnership income, such distribution shall be deemed to have been made first out of items of taxable gross income not requiring separate computation under paragraphs (1) to (8) inclusive of subsection (*a*) of Section 702 of the Internal Revenue Code. Without limiting the generality of the foregoing this provision shall apply to any payments made pursuant to Article XXIV and to any payments of interest on general capital contributions, additional interest on limited or general capital contributions, and interest on cash balances in a General Partner's Pledge Account.

(*d*) Each Partner's distributive share of each item of Partnership income, gain, loss, deduction or credit (after excluding all items referred to in subparagraphs (*a*), (*b*) and (*c*) above) shall be the same fraction thereof as such Partner's fraction of the net profits or net losses, as the case may be, under Article VIII or Article IX, respectively. Without limiting the generality of the foregoing, this provision shall apply to each item of short-term capital gains and losses, long-term capital gains

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and losses, gains and losses from property used in the trade or business, charitable contributions, dividends from domestic corporations, taxes paid to foreign countries, partially tax exempt interest, tax exempt interest, and all other items of taxable or non-taxable income or loss.

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515 F. 2d 763

TRUSTEES OF THE GRACELAND CEMETERY IMPROVEMENT FUND v. THE UNITED STATES

No. 446-69

TRUSTEES OF THE GRACELAND CEMETERY IMPROVEMENT FUND, *qua* TRUSTEES OF THE GRACELAND CEMETERY IMPROVEMENT FUND—GENERAL FUND v. THE UNITED STATES

No. 447-69

TRUSTEES OF THE GRACELAND CEMETERY IMPROVEMENT FUND, *qua* TRUSTEES OF THE GRACELAND CEMETERY IMPROVEMENT FUND—LOT OWNERS' FUND v. THE UNITED STATES

No. 448-69

TRUSTEES OF THE GRACELAND CEMETERY IMPROVEMENT FUND, *qua* TRUSTEES OF THE GRACELAND CEMETERY IMPROVEMENT FUND—MARSHALL FIELD FUND v. THE UNITED STATES

No. 449-69

[Decided April 16, 1975]*

OPINION

Taxes; income tax; exempt organization; cemetery company; "trusts"; deductions; expenses of trade or business; depreciation.—This is a consolidated action, before the court on a stipulation of facts, seeking refund of federal income taxes and assessed interest for tax years ending April 30, 1962–1965. Three of the four cases, filed for protective purposes, represent "trust" entities created by the Internal Revenue Service for tax assessment purposes. The

*See Order amending opinion, *post* at 901.

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principal plaintiff, the Trustees of Graceland Cemetery Improvement Fund ("plaintiff" or "Improvement Fund") contend that these "trusts" do not exist and therefore should not be taxed. Improvement Fund is a non-profit, non-shareholding special charter Illinois corporation whose principal purpose is the perpetual care and maintenance of the Graceland Cemetery, membership arising by virtue of ownership of a cemetery lot; directors who operate Improvement Fund are chosen from among said membership. Graceland Cemetery Company ("Cemetery Company" or "Company") is a special charter Illinois stockholding corporation operated for profit, selling burial lots, providing interment services, operating a crematory and selling space for cremated remains; no officer, director or shareholder of Company has served as a member of the Board of Trustees of Improvement Fund; each corporation maintains its own offices, bank accounts, financial records. Pursuant to Sec. 1 of Improvement Fund's Act of Incorporation, Company is obligated to pay to the former 10% of its proceeds from the sale by Company of lots in the cemetery to be used for the improvement and preservation of the grounds, which funds are designated as a permanent fund of at least $50,000; the investment income therefrom and any amounts in excess of $50,000 are committed to the care and improvement of the grounds and structures thereon. Improvement Fund is also authorized pursuant to Sec. 9 of the Act to receive grants, bequests or donations for improvement and care of particular lots to be expended pursuant to the specific terms of the grant. Since 1943 plaintiff filed a single corporate income tax return in the name of "Trustees of the Graceland Cemetery Improvement Fund," reporting as income the said Sec. 1 percentage of proceeds from lot sales, plus income and gains and losses from investments; however, the amounts received under Sec. 9 were not included as income. Also plaintiff has claimed the 85% investment dividends received deductions pursuant to Sec. 243(a)(1) of the 1954 Code, has deducted depreciation on capital improvements made on the cemetery property, and has deducted payments made for cemetery maintenance and lot-care expenses. IRS contends that plaintiff's reported income was received by and taxable to three different "trusts," i.e. (1) "General Fund" (Docket 447–69) created for investment of the Sec. 1 percentage of lot-sales proceeds, (2) "Marshall Field Fund" (Docket 449–69) created as a result of Sec. 9 contributions for special care of the Marshall Field lot (selected by IRS as representative of all Sec. 9 individual "trusts"), and (3) "Lot Owners' Fund" (Docket 448–69) constituted an association of all trusts created pursuant to Sec. 9 and taxable as a corporation. IRS denied the alleged "trusts" deductions for depreciation, cemetery maintenance or cost of care of individual lots, and also did not allow the "General Fund" as an alleged trust to claim the corporate dividend received deduction. Marshall Field Fund was taxed on income received in the form of a pro rata dividend from Lot Owners'

Syllabus

Fund. Plaintiff paid the assessed deficiencies and interest; its claim for refund was disallowed, and this suit followed. Plaintiff also claims it is a tax exempt cemetery company under Sec. 501(c)(13) of the Code and therefore entitled to a refund of all taxes paid by it during said tax years. Since the deficiency assessed against Improvement Fund was for protective purposes only in event the court finds that the three "trusts" are not real taxable parties, regardless of the conclusion reached plaintiff is entitled to refund of either the deficiency charged to Improvement Fund or the tax deficiency charged to the "trusts." It is *held* (1) that plaintiff is not a tax exempt cemetery company within the definition of Sec. 501(c)(13), but is an adjunct of Cemetery Company for tax purposes, although the court is not saying that the organizations represent a single entity; (2) that neither Cemetery Company nor the individual lot owners intended for the fund created from the Sec. 1 percentage of lot-sale proceeds to be a trust, and therefore those funds contained in plaintiff's General Fund account should be treated as corporate assets of plaintiff and taxed accordingly; (3) that the payments made for the care of the cemetery lots, known as the Lot Owners' Fund (which included the Marshall Field Fund), created by IRS, are not independent trusts and do not constitute an association for tax purposes; since these entities do not exist, taxes collected from them must be refunded to plaintiff; (4) plaintiff should be allowed to deduct as a necessary and ordinary business expense all payments made for cemetery care and upkeep, as well as allowed a depreciation deduction on property owned by it and used in the business of maintaining a cemetery, and on capital additions thereto. The "trust" petitions for tax refund are dismissed. The case is remanded to the trial judge for determination of the amount of plaintiff's recovery consonant with the court's conclusions.

Taxes; income tax; exemption from taxation; cemetery company; entitlement to tax exemption.

[1] Under Sec. 501(c)(13) of the 1954 Internal Revenue Code, three mutually independent requirements for a cemetery company to qualify for tax exemption are: (1) it must be owned and operated exclusively for the benefit of its members, (2) it must not be operated for profit, or (3) it must be a cemetery corporation chartered solely for burial purposes, not permitted by its charter to engage in activities not incident to those purposes and no part of its net earnings inure to an individual or shareholder. Where a non-profit, non-shareholding, perpetual care cemetery corporation (A) is operated in connection with a profit-making cemetery company (B) which sells burial lots, provides interment and related services and has sole responsibility for the actual running of the cemetery, and where A's primary function is to provide funds for B's activities in maintaining the cemetery which B would have paid for out of its own revenues in any case, and A's financial support assisted B in

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pursuing its sales policy thus benefitting its shareholders, A is an adjunct of B within the meaning of the Code and Rev. Rul. 64–217, and are so related functionally that A has acquired the taxable status of B. That there is no legal or contractual obligation on the part of B to provide care and maintenance for the cemetery is no deterent to this conclusion, nor does it make a difference whether A is a trust or a corporation.

Internal Revenue ⇐ 830

Taxes; income tax; exemption from taxation; cemetery companies; corporation v. trust.

[2] While a perpetual care cemetery organization operated in connection with a profit-making cemetery company may take either the form of a trust or a corporation, if a trust is intended it is denied the corporate income tax rate as well as the 85% deduction allowed on dividends received from other domestic corporations under Sec. 243(a) of the 1954 Code.

Internal Revenue ⇐ 830

Trusts; creation of trust; intention to create trust.

[3] It is fundamental trust law that the existence of a trust depends on what the parties said and intended. Thus, where the Act of Incorporation of a non-shareholding, perpetual care cemetery corporation (A) authorized and required profit-making cemetery company (B) to set apart out of the proceeds of all cemetery lots B sold 10% as a reserve fund for care and maintenance of the grounds, which fund A maintained in its general fund account, absent an express agreement, either written or oral, on the part of the lot owners or B evidencing intent to create a trust, no trust was created with said 10% of the proceeds from the lot sales. Although Section 4 of the Act permits A's trustees to adopt such regulations as needful for the proper management of the "affairs of their *trust*," the fact that the Act does not name a beneficiary or show a desire to pass benefits through the medium of a trust and not through some related or similar device, is strong evidence that the use of the term "trust" was made to describe merely the fiduciary duty of care that the Trustees have to the 10% proceeds and not to create a legally enforceable trust.

Trusts ⇐ 26

Taxes; income tax; income subject to tax; long-standing administrative interpretation.

[4] Although the Internal Revenue Service is always free to change its interpretation of the tax code as applicable to a given situation, where tax liability is dependent on an interpretation of a party's intent a long-standing course of conduct is highly relevant. Thus, the fact that for 25 years plaintiff (A) treated the receipt of 10% of the proceeds from all cemetery lots sold by (B) as A's corporate income and not as trust funds, and filed corporate income tax returns which were accepted by the Service is highly probative of the issue

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of whether there was originally an intent to set up a trust fund out of said proceeds.

Internal Revenue ⇐ 830

Trusts; creation of trust; intention to create trust; Internal Revenue interpretation.

[5] No change of interpretation or tax philosophy by the Internal Revenue Service can make corporate assets of plaintiff, a perpetual care cemetery corporation operated in connection with a profit-making cemetery company, into trust funds for the care of an individual lot as provided in the Act of Incorporation, where the parties never intended the creation of a trust, no beneficiary was named, and the Act permits plaintiff to take steps inconsistent with the duties placed on a trustee of a trust, such as commingling of the payments with any other funds received by plaintiff.

Internal Revenue ⇐ 830

Trusts; creation of trust; intention to create trust.

[6] The mere fact that the Act of Incorporation of the perpetual care cemetery uses the words "upon trust" in connection with payments made for the care of an individual lot, does not by itself mean that the money so received was a trust, where all other indicia of the creation of a trust are missing.

Trusts ⇐ 25(1)

Taxes; income tax; corporations; association taxable as corporation; characteristics of corporation.

[7] An association will be classified for purposes of taxation as a corporation, rather than as a general trust or a partnership, if it has associates, an objective to carry on business and divide the gains therefrom, continuity of life, centralization of management, liability for corporate debts limited to corporate property, and free transferability of interests. Treas. Reg. § 301.7701–2(a)(2) states that the absence of associates or a joint business objective prevents an organization from being called an "association" and being taxed as a corporation. Thus, the subject "Lot Owners' Fund" representing, as alleged by the Internal Revenue Service, an association of all "trusts" created by contributions for the care of each individual lot, fails to meet the two determinative requirements of the regulation since it does not comprise associates and there is no discernible objective by the alleged "associates" to carry on business and divide the gains.

Internal Revenue ⇐ 815

Taxes; income tax; deductions; expenses, trade or business; ordinary and necessary; care and maintenance of cemetery.

[8] The determination of whether an expenditure is ordinary expense deductible in computing taxable business income must be made on the basis of what is ordinary for a business having the nature and scope of the particular enterprise in question. Similarly, an expense is necessary if it is appropriate and helpful in develop-

ing and maintaining the taxpayer's business. Where plaintiff A, a non-shareholding, perpetual care cemetery corporation which operates in connection with a profit-making cemetery company B and which has been determined as having acquired the taxable status of B, is charged by its Act of Incorporation with the preservation and maintenance of the cemetery, A is entitled to deduct the amounts paid to B for such care and maintenance as ordinary and necessary business expenses. The profit factor is really only significant insofar as it is a means of distinguishing between an enterprise carried on in good faith as a "trade or business" and an enterprise carried on merely as a hobby, or for determining whether profit and nonprofit activities of a single taxpayer may be aggregated and treated as a single integrated trade or business.

Internal Revenue ⇐ 557.1

Taxes; income tax; deductions; depreciation; costs of improvements of leased cemetery property.

[9] Where plaintiff A, a non-profit, non-shareholding, perpetual care cemetery corporation which operates as an adjunct of a profit-making cemetery company B to whom it has leased structures on the cemetery property, and which has been determined as having acquired the taxable status of B, is obligated by its Act of Incorporation to use its income in the improvement and maintenance of the cemetery grounds, buildings, monuments, etc., such improvements are within the trade or business in which A participates and are depreciable by A under Sec. 167 of the Code.

Internal Revenue ⇐ 721

Taxes; income tax; deductions; depreciation; lessor's right to depreciate.

[10] In general, a lessor may depreciate property subject to a bona fide lease.

Internal Revenue ⇐ 713

Sharon L. King, attorney of record for plaintiff. *Walter J. Hartmann*, *Robert W. Kleinman* and *Isham, Lincoln & Beale*, of counsel.

Patricia B. Tucker, with whom was *Assistant Attorney General Scott P. Crampton*, for defendant. *Theodore D. Peyser* and *Donald H. Olson*, of counsel.

Before SKELTON, NICHOLS, and BENNETT, *Judges*.

SKELTON, *Judge*, delivered the opinion of the court:

This case is the consolidation of four closely related causes of action all seeking a refund of federal income taxes for

the tax years ending April 30, 1962, 1963, 1964, and 1965. It comes before us under stipulation of facts for determination of the plaintiffs' right to recover taxes allegedly overpaid, reserving the question of quantum for further proceedings. Three of the four plaintiffs represent "trust" entities created by the Internal Revenue Service for the purpose of assessing tax during the years in question. For protective purposes only, the principal plaintiff, the Trustees of Graceland Cemetery Improvement Fund (hereinafter referred to as plaintiff or Improvement Fund), filed petitions in the names of these IRS defined entities, although it continues to maintain that these "trusts" do not exist and therefore should not be taxed. The necessary facts stipulated to by the parties are incorporated in our opinion below.

The Improvement Fund was organized and incorporated by a special act of the Illinois legislature, approved February 16, 1865. It was established as a non-share-holding special charter Illinois corporation whose principal purpose is the perpetual care and maintenance of the Graceland Cemetery located in Chicago, Illinois. Membership in the corporation arises by virtue of ownership of a lot in the Graceland Cemetery; each member is entitled to one vote at meetings called pursuant to the Act of Incorporation to fill vacancies on the Board of Trustees of the Graceland Cemetery Improvement Fund. This elected Board has at all times served without salary or other compensation and has been vested with the management of the Improvement Fund.

The Graceline Cemetery Company (hereinafter Cemetery Company or Company), incorporated separately from the Improvement Fund, is a special charter Illinois corporation created February 22, 1861, by act of the Illinois legislature. The Cemetery Company is a stockholding corporation which, since its inception, has operated the Graceland Cemetery for profit. In addition to selling burial lots and providing interment services, the Cemetery Company operates a crematory and sells space for the temporary and permanent storage of cremated remains. No officer, director, or shareholder of the Cemetery Company has ever served as a member of the Board of Trustees of the Improvement Fund. Moreover, the Improvement Fund and the Cemetery Com-

pany each has its own office and all bank accounts, financial records or other books are kept separate.

In accordance with Section 1 of the Improvement Fund's Act of Incorporation of 1865, the Cemetery Company is obligated to pay over to the Improvement Fund ten percent of the proceeds from the initial sale by the Cemetery Company of lots in the Graceland Cemetery. Under the Act of Incorporation these revenues are to be designated as a permanent fund of at least $50,000. The investment income from this fund and any amounts in excess of $50,000 are committed to the perpetual preservation and improvement of the grounds and structures of Graceland Cemetery.

In addition to the income representing ten percent of the sale of lots, the Improvement Fund is authorized by Section 9 of the Act of Incorporation to receive funds through grants, bequests, or donations for the improvement and care of particular lots. Such funds are to be expended for uses consistent with the purpose of perpetual maintenance and in accordance with specific terms of the original grant.

For each tax year since 1943 including the tax years in question here, the plaintiff filed a single corporate income tax return in the name "Trustees of the Graceland Cemetery Improvement Fund." In its returns the Improvement Fund reported as income the amounts received from the Cemetery Company representing ten percent of the proceeds of lot sales plus the income and gains and losses from the investments made. The amounts received from lot owners under Section 9 for specific care, however, were not included as income. In addition, plaintiff (1) claimed the 85 percent investment dividends received deduction available to corporations under section 243(a)(1) of the Internal Revenue Code of 1954, (2) deducted depreciation on capital improvements made on property owned by it, and (3) deducted payments made for cemetery maintenance expenses and care of lot expenses.

Upon audit, the Internal Revenue Service determined that the income reported by the plaintiff was actually received by and taxable to three different "trusts" defined by the Service: (1) "The Trustees of the Graceland Cemetery Improvement Fund—General Fund" (hereinafter, General Fund), constituting a trust allegedly created for the investment of the

ten percent proceeds from lot sales received from the Cemetery Company, (2) "The Trustees of the Graceland Cemetery Improvement Fund—Marshall Field Fund" (hereinafter, Marshall Field Fund), a representative trust created as a result of contributions made under Section 9 for the special care of the Marshall Field lot (the IRS considered each contribution made under Section 9 for the care of a particular lot to constitute a separate taxable trust, but chose the Marshall Field lot, being the largest, for purposes of testing the new tax theory) and, (3) "The Trustees of the Graceland Cemetery Improvement Fund—Lot Owners' Fund" (hereinafter, Lot Owners' Fund), constituting an association of all trusts created by contributions and bequests made under Section 9, such as the Marshall Field Fund, and taxable as a corporation.

In determining the deficiencies to be charged to each of these allegedly taxable entities the IRS denied the three trusts deductions for depreciation, cemetery maintenance, or the cost of care of individual lots. Moreover, the General Fund being a trust was not allowed to claim the corporate dividend received deduction. In determining the taxable income to the Marshall Field Fund, the IRS taxed this trust on income received in the form of a pro rata dividend from the Lot Owners' Fund. The deficiencies assessed were:

GENERAL FUND

For the Year Ended April 30	Assessed Deficiency	Assessed Interest	Total
1962	$38,773.06	$14,171.29	$52,944.35
1963	46,595.06	14,234.47	60,829.53
1964	38,359.92	9,417.10	47,777.02
1965	58,095.16	10,776.23	68,871.39
	$181,823.20	$48,599.09	$230,422.29

MARSHALL FIELD FUND

For the Year Ended April 30	Assessed Deficiency	Assessed Interest	Total
1962	$382.99	$139.98	$522.97
1963	280.67	85.74	366.41
1964	452.61	111.11	563.72
1965	334.55	62.06	396.61
	$1,450.82	$398.89	$1,849.71

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LOT OWNERS' FUND

For the Year Ended April 30	Assessed Deficiency	Assessed Interest	Total
1962	$37,380.91	$14,015.28	$51,396.19
1963	29,345.31	9,241.76	38,587.07
1964	38,341.15	9,774.37	48,115.52
1965	32,017.09	6,241.14	38,258.23
	$137,084.46	$39,272.55	$176,357.01

For protective purposes the IRS assessed a deficiency against the Trustees of Graceland Cemetery Improvement Fund on the basis of a denial of the plaintiff's deductions for maintenance costs and depreciation. This deficiency totaled:

For the Year Ended April 30	Assessed Deficiency	Assessed Interest	Total
1962	$30,564.40	$9,886.12	$40,450.52
1963	31,812.48	8,381.06	40,193.54
1964	33,782.34	6,873.09	40,655.43
1965	35,378.92	5,075.18	40,454.10
	$131,538.14	$30,215.45	$161,753.59

On September 30, 1968, all of the foregoing asserted tax deficiencies and interest, totaling $570,382.60 were paid by plaintiff. Thereafter, plaintiff's claim for refund was disallowed by the District Director and this suit was timely filed.

In addition to claiming a refund on these tax deficiencies assessed and paid, plaintiff claimed that it was a tax exempt cemetery company under section 501(c)(13) of the Internal Revenue Code of 1954 and therefore it was entitled to a refund of all taxes paid by it during the years in question as follows:

Year Ending April 30	*Amount of Tax Paid*
1962	$24,440.44
1963	22,196.75
1964	18,264.95
1965	29,451.59
	$94,353.73

It must be noted that because the deficiency assessed against the Improvement Fund by the IRS was for protective purposes only in case this court finds that the three "trust" entities are not the real taxable parties, the plaintiff has been forced to pay a double taxation. For this reason, regardless of what conclusion we reach here, the plaintiff is entitled to some refund, either the deficiency charged to the Improvement Fund, or the tax deficiency charged to the three "trusts."

There are three basic issues that must be resolved in deciding the plaintiff's right to recover a refund. First, it must be determined whether a perpetual care fund, such as the Improvement Fund, operating in connection with a profit-making cemetery is entitled to a tax exemption under section 501(c)(13) of the Internal Revenue Code of 1954. Second, if it is found that the Improvement Fund is not a tax exempt company, we must decide what are the taxable entities here, the Improvement Fund or the "trusts." Third, if the plaintiff is to be taxed not as a trust but as a corporation as it alleges it should, it must be determined whether it should be allowed to take a deduction for the costs of cemetery maintenance and for depreciation on improvements to its capital structures.

I—*Tax Exempt Cemetery Companies*

Section 501(a) of the Internal Revenue Code of 1954 exempts from tax certain types of organizations including cemetery companies as defined in section 501(c)(13):

> (13) Cemetery companies owned and operated exclusively for the benefit of their members or which are not operated for profit; and any corporation chartered solely for burial purposes as a cemetery corporation and not permitted by its charter to engage in any business not necessarily incident to that purpose, no part of the net earnings of which inures to the benefit of any private shareholder or individual. (26 U.S.C. § 501(c)(13) (1964))

Whether the plaintiff here qualifies as such a company depends on the particular functions performed by it as well as its relationship with the non-tax exempt, profit-making

Graceland Cemetery Company. We must first look at the particular facts involved in the instant case.

The general maintenance and care required for the common areas of the Graceland Cemetery has always been provided by the Cemetery Company. Since an agreement signed on July 1, 1935, by the plaintiff and the Cemetery Company, the Cemetery Company has received from the Improvement Fund $12,000 a year in equal monthly installments for this general maintenance work. These funds presumably come from the income earned through the investment of the ten percent received by the plaintiff on the initial sale of cemetery lots. Despite this payment, the Cemetery Company has had to expend out of its own revenues well in excess of $12,000 to cover the costs of the upkeep of the common areas. In fact, the stipulated facts indicate that the Company spent on the average more than $27,000 per year for labor alone associated with maintaining the cemetery's walks, roads, and other public areas.

Aside from the common areas which are maintained out of a percentage of the sale price, when a person purchases a lot in the Graceland Cemetery, he is told that he is responsible for his own care of it. Thus, an owner may provide on his own for mowing, watering, the placing of wreaths or other services specifically desired for his own lot, or he may request the Cemetery Company to perform these services and bill him yearly for it. Although these bills require that "payment must be made before work is done," the Cemetery Company voluntarily performs those services necessary to preserve the general appearance of the cemetery regardless of whether payment is actually made.

Periodically, lot owners are informed by the Cemetery Company, at the request of the Improvement Fund, that they may be relieved of their yearly maintenance bill for individual care by setting up a permanent care fund with the plaintiff. Such a payment made to the Improvement Fund under Section 9 of its Act of Incorporation results in care being maintained in perpetuity.

Although some owners have provided their own care and maintenance, the Cemetery Company has primarily performed all of the maintenance on grave sites, except for

mausoleum repair, either by being hired directly by the owners or being hired by the Improvement Fund to take care of those lots for which Section 9 funds have been received. However, just as the Cemetery Company performed those services necessary to maintain the general appearance of grave lots whether or not the particular owner actually paid his yearly bills, until 1963 the company did not even bill the Improvement Fund for care of lots for which plaintiff received funds under Section 9. All mowing and watering on individual lots was provided by the Cemetery Company as a matter of pride as well as part of its sales policy.

The plaintiff, beyond merely paying the bills for the work done on lots having a perpetual care fund also periodically visited the cemetery to determine what extra work was needed. All bills it received for work done on an individual lot were charged to the particular Section 9 fund established for that lot.

Unlike the Cemetery Company which has always operated for a profit and has never been considered tax exempt, the Improvement Fund now claims that because it is a nonprofit, nonshareholding company it should be considered eligible for a section 501(c)(13) exemption. Under this section three mutually independent requirements for a cemetery company to qualify for a tax exemption are: (1) it must be owned and operated exclusively for the benefit of its members, (2) it must not be operated for profit, or, (3) it must be a cemetery corporation chartered solely for burial purposes, not permitted by its charter to engage in activities not incident to those purposes and no part of its net earnings inure to an individual or shareholder. If the plaintiff is a cemetery company and meets any one of the three requirements, it will be exempt. The issue becomes whether a perpetual care organization, such as the Improvement Fund, which is operated in connection with a profit-making cemetery, is a cemetery company and is within one of the three alternative categories of section 501(c)(13).

Although this is a question of first impression in this court, other federal courts have dealt with the issue. *See Evergreen Cemetery Association of Seattle* v. *United States*, 444 F. 2d 1232 (9th Cir. 1971), *cert. denied*, *sub nom. Washington*

Trust Bank v. *United States*, 404 U.S. 1059 (1972); *Washington Trust Bank* v. *United States*, 444 F. 2d 1235 (9th Cir. 1971), *cert. denied*, 404 U.S. 1059 (1972); *Mercantile Bank & Trust Co.* v. *United States*, 441 F. 2d 364 (8th Cir. 1971); *Evergreen Cemetery Ass'n.* v. *United States*, 375 F. Supp. 166 (W.D. Ky. 1974); *Provident National Bank* v. *United States*, 325 F. Supp. 1187 (E.D. Pa. 1971); *Arlington Memorial Park Ass'n.* v. *United States*, 327 F. Supp. 344 (W.D. Ark. 1971); *Rosehill Cemetery Co.* v. *United States*, 285 F. Supp. 21 (N.D. Ill. 1968); *First National Bank of Waco* v. *United States*, 327 F. Supp. 1119 (W.D. Tex. 1970); *Denver United States National Bank* v. *United States*, 302 F. Supp. 801 (D. Colo. 1965); *Resthaven Memorial Park & Cemetery Ass'n.* v. *United States*, 155 F. Supp. 539 (W.D. Ky. 1957).

With the exception of *Denver United States National Bank*, *supra*, and *Resthaven Memorial Park & Cemetery Ass'n.*, *supra*, the courts found in each case that the nonprofit perpetual care fund organization did not qualify for a tax exemption when associated with a profit-making cemetery corporation. The reasons for the denial of an exemption, however, were not uniform. In several cases the federal courts decided that a perpetual care organization whose only function is the providing of funds for a profit-making cemetery company and which does not own its own cemetery land nor perform burials or provide care and maintenance, cannot qualify as a "cemetery company" as the term is used in section 501(c)(13). *See Mercantile Bank & Trust Co.* v. *United States*, *supra; Evergreen Cemetery Ass'n.* v. *United States*, 375 F. Supp. 166 (W.D. Ky. 1974); *Evergreen Cemetery Association of Seattle* v. *United States*, *supra*. In *Rosehill Cemetery Co.*, *supra*, the district court looked to prevailing revenue rulings to decide that the perpetual care fund organization was so closely connected with a profit-making cemetery company that it takes on its taxable status. Using a similar type of analysis, the court in *First National Bank of Waco*, *supra*, decided that where the perpetual care fund merely provided funds to help defray the costs for which the profit-making cemetery was obligated, it must be considered a functional part of the taxable cemetery company.

Exemptions from federal income tax have always been strictly construed. *Bingler* v. *Johnson*, 394 U.S. 741 (1969); *Commissioner* v. *Jacobson*, 336 U.S. 28, 49 (1949); *Mercantile Bank & Trust Co.* v. *United States*, *supra*. Given the factual context of the instant case and the long line of precedents denying tax exemptions for nonprofit organizations providing perpetual care funds for a profit-making cemetery company, we believe, for the reasons hereinafter discussed, that the Improvement Fund is not tax exempt under section 501(c)(13).

This court has held in the past that where one organization provides a service which is necessary and indispensable to the operations of another, the first will take on the tax status of the second. *Hospital Bureau of Standards & Supplies, Inc.* v. *United States*, 141 Ct. Cl. 91, 158 F. Supp. 560 (1958). In that case the plaintiff was an organization that purchased medical supplies in bulk for its tax exempt member hospitals thereby providing a savings in cost that could not be achieved by the individual hospitals. As a result, the plaintiff was granted the same tax exempt status as its member hospitals. There we held:

> Unquestionably the technical analysis and purchase of hospital supplies from suppliers are necessary and indispensable to the operations of the plaintiff's member hospitals. * * * Where the taxpayer is engaged in a business enterprise that bears a close and intimate relationship to the functioning of a tax-exempt educational institution, it has been held that the taxpayer is entitled to an exemption as an educational institution within the meaning of section 101 (6) of the Internal Revenue Code of 1939. *Squire* v. *Students Book Corporation*, 191 F. 2d 1018. * * * [*Id.* at 94, 158 F. Supp. at 562.]

In *Squire* v. *Students Book Corp.*, 191 F. 2d 1018 (9th Cir. 1951), the court granted an exemption to a corporation which ran a bookstore and restaurant on the campus of a tax exempt state college, stating: "The business enterprise in which taxpayer is engaged obviously bears a close and intimate relationship to the functioning of the College itself." [*Id.* at 1020.] *See also Produce Exchange Stock Clearing Ass'n.* v. *Helvering*, 71 F. 2d 142 (2d Cir 1934). In the latter

case a tax exemption was denied a nonprofit-making service organization which performed necessary services which would ordinarily be performed by a profit-making business. The Second Circuit noted:

> * * * The petitioner is merely an adjunct to the business of the Produce Exchange. Had the latter extended its own services to include [that which was provided by the petitioner] * * * it would clearly have remained a nonexempt stock exchange. The statute could never have contemplated that by creating a subsidiary corporation to furnish such facilities, even though they were intended to be performed at cost, it could obtain tax exemption for its creature. * * * [*Id.* at 143.]

These cases clearly indicate that where one organization serves as a mere adjunct for a primary organization by providing services which are essential to the functioning of the primary organization and which would be normally performed by it, the adjunct will acquire the tax status of the primary company. This adjunct theory has been applied to cemetery companies by the Internal Revenue Service in Rev. Rul. 58–190, 1958–1 CUM. BULL. 15 and Rev. Rul. 64–217, 1964–2 CUM. BULL. 153.

Rev. Rul. 58–190, *supra*, deals with an organization formed to receive perpetual care funds for a nonprofit-making cemetery. Despite the fact that the perpetual care organization did not own land nor perform any services other than receiving and administering funds for the perpetual care of the cemetery, the IRS granted it a section 501(c)(13) tax exemption. The rationale given by the IRS was that "* * * it performs a service essential to the maintenance of a cemetery * * *." [*Id.* at 17.] This revenue ruling was clarified in a later ruling, Rev. Rul. 64–217, *supra:*

> * * * Implicit in [Rev. Rul. 58–190] * * * is a recognition that the perpetual care funds are providing an essential part of the functions of the cemetery companies themselves. They are thus so closely connected with the actual cemetery companies that they partake of the character of the cemetery companies for exemption purposes. * * * [*Id.* at 154.]

In Rev. Rul. 64–217 an exemption was sought for a perpetual care trust that was set up by a profit-making cemetery

company. The income from the invested funds representing ten percent of the sale of cemetery lots was required to be turned over to the cemetery company for maintenance and care. The IRS denied the exemption because it viewed the trust as being only an adjunct of the nonexempt profit-making cemetery company and therefore should take on the nonexempt nature of the cemetery company.

The Rev. Ruling provided:

> * * * Where the company actually operating the cemetery is itself a profit-making enterprise, the perpetual care fund operated in connection with it would also partake of this character and would not be entitled to exemption from Federal income tax. * * * [*Id.* at 154.]

In a similar way, the facts in the instant case and discussed above, point toward a finding here that the Improvement Fund must be considered an adjunct of the Graceland Cemetery Company for purposes of tax exemptions. The Cemetery Company had the sole responsibility for the actual running of the cemetery. Moreover, it had shown in a number of ways that it would provide at least those services believed needed to preserve the cemetery's general appearance regardless of what the plaintiff did or whether plaintiff or private lot owners reimbursed it for its costs. As seen, the stipulated facts show that the Cemetery Company handled the excess costs over the $12,000 paid by the plaintiff to maintain the common areas. Also, the Cemetery Company, at least up until 1963, never billed the plaintiff for individual care on lots for which a Section 9 fund had been created by its owner.

On the other hand, besides supervising the requested care for lots under Section 9, the plaintiff's primary function was providing funds for the Cemetery Company's activities in maintaining the cemetery, which the Company would have paid for out of its own revenue in any case; thus the plaintiff must be considered an adjunct organization as the term is used in Rev. Rul. 64–217, *supra*, and the plaintiff must acquire the Cemetery Company's taxable status. *See* Rev. Rul. 64–217, *supra; Hospital Bureau of Standards & Supplies, Inc., supra.*

As was stated in *Rosehill Cemetery Co.* v. *United States*, *supra*, it takes more than the limited activity of providing funds to run a cemetery to make a company a tax exempt "cemetery company":

> * * * But merely because a legal entity performs a cemetery function [such as the commitment of income for the perpetual care of a cemetery] and because it does not itself operate at a profit, it cannot be assumed to be an entity described by Congress as a "cemetery company * * * operated not for profit" and hence exempt from taxation. The most that can be said for this kind of perpetual care fund is that it "*provides an essential part of the functions of the cemetery companies themselves.*" * * * [Emphasis supplied.] [285 F. Supp. at 24.]

The court further declared that such an adjunct must be taxed as is its cemetery company:

> * * * Where a fund is an adjunct to a nonprofit cemetery association, it is both logical and reasonable to attribute to it the exempt status of that association, but where, as here, such a fund is closely connected with a profit-making enterprise, there is no ground in logic or reason for allowing it an exemption from federal income taxation. [*Id.* at 25.]

The absence of any legal or contractual obligation on the part of the Cemetery Company to provide care and maintenance for the Graceland Cemetery should not in any way prevent us from finding the plaintiff to be an adjunct of the company. It is enough that the Cemetery Company has historically taken it upon itself to maintain the general appearance of the cemetery. We cannot help but note that to the extent the cemetery is kept in a neat and attractive condition the profit-making Cemetery Company will find it that much easier to sell lots in the future or to induce local funeral directors to recommend the cemetery for interment. Nor do we feel it makes any difference to our consideration whether plaintiff is a trust or a corporation. *See Washington Trust Bank* v. *United States*, 444 F. 2d 1235 (9th Cir. 1971), *cert. denied*, 404 U.S. 1059 (1972).

Besides being ineligible as an adjunct of a profit-making cemetery company, the fact that funds paid to the Cemetery

Company inured to the advantage of the Company should further prevent the plaintiff from claiming a section 501(c)(13) exemption. To the extent the plaintiff's financial support of the Cemetery Company assisted it in pursuing its sales policy, the shareholders of the profit-making company benefited. This type of benefit was recognized in Rev. Rul. 64–217, *supra*, where a perpetual care fund was declared an adjunct and denied an exemption as follows:

> * * * Furthermore, as the services and facilities furnished by a perpetual care fund to a cemetery operated for profit constitute substantial assistance in its business by affecting the salability and selling price of lots, and relieving the company itself of a legal or contractual obligation, net earnings of such funds inure to the benefit of the profit company or its shareholders. * * * [1964–2 CUM. BULL. at 154.]

For all of the above reasons we hold that the plaintiff is not a tax exempt cemetery company within the definition of section 501(c)(13). We must emphasize that in finding the plaintiff to be an adjunct of the Cemetery Company for tax purposes, we are not saying that the two organizations represent a single entity. *Cf. Evergreen Cemetery Association of Seattle* v. *United States*, *supra*. We recognize that the two enterprises are run as completely independent enterprises with no commingling of funds or corporate officers. We hold instead, that they are so sufficiently related functionally that the plaintiff acquires the tax status of the profit-making company to which it furnishes assistance of an essential nature.

II—*Allocation of Income*

In assessing back taxes, the IRS allocated all of the income originally reported by the Improvement Fund to each of three trusts defined by the Service and allegedly representing the true taxable entities. As described earlier, the three trusts defined by the IRS included: (1) the General Fund, representing a trust formed from a percentage of the proceeds from lot sales paid to the plaintiff by the Cemetery Company, (2) the Marshall Field Fund, a trust created from a contribution for individual care of a grave site made under Section 9, and (3) the Lot Owners' Fund, an associa-

tion of all trusts created by Section 9 contributions and taxed as a corporation.

Although the IRS is seeking to treat the Improvement Fund in this instant case as a group of trusts, it is clear from past federal cases that in general a perpetual care organization such as the plaintiff, may either take the form of a trust, *see Mercantile Bank & Trust Co.* v. *United States*, 441 F. 2d 364 (8th Cir. 1971); *First National Bank of Waco* v. *United States*, 327 F. Supp. 1119 (W.D. Tex. 1970); or it may take the form of a corporation. *See Evergreen Cemetery Association of Seattle* v. *United States*, 302 F. Supp. 720 (W.D. Wash. 1969), *aff'd*, 444 F. 2d 1232 (9th Cir. 1971). The form that the perpetual care fund takes is significant for the purpose of federal income tax. Thus, if the instant plaintiff is deemed to be a trust, it would be denied the corporate income tax rate as well as the 85 percent deduction allowed on dividends received from other domestic corporations under section 243(a) of the Internal Revenue Code of 1954.

The government admits in its brief that at least since 1943 the plaintiff has filed corporate returns in which the income in question was not considered to be allocated to any trust entities. However, it points out that the treatment of perpetual care funds is a developing area of the law and that this is a test case of its new theory.

A—*The General Fund*

Section 1 of the plaintiff's Act of Incorporation states:

> Be it enacted by the people of the State of Illinois, represented in the General Assembly, that the Board of Managers of said Graceland Cemetery Company are hereby authorized and required, out of the proceeds of all lots sold * * * to set apart ten per cent thereof as a reserve fund, to be from time to time paid over to the Treasurer of the Board of Trustees hereinafter named and to be kept and used by them as hereinafter provided.

The income from this reserve fund is required by Section 8 of the Act of Incorporation to be used "in the improvement ornamentation, preservation, and maintenance of the grounds, walks, shrubberies, enclosures, structures, monu-

ments, and memorials * * *." These funds were deposited for bookkeeping purposes into an account termed "General Fund" which included all corporate assets of the plaintiff not reflected elsewhere. This account is charged with all administrative expenses such as office costs, salaries, management, custodial, legal and auditing fees plus federal income tax. That portion of this account which reflects the ten percent of lot sales was allegedly one of the trusts the IRS sought to recognize.

It is fundamental trust law that the existence of a trust depends on what the parties said and intended. *Oak Woods Cemetery Ass'n.* v. *United States*, 345 F. 2d 361 (7th Cir. 1965). An express trust is formed only if the settlor properly manifests an intention to create a trust. It is insufficient that his intention is secretly expressed; there must be some outward manifestation of his intention. *Del Drago* v. *Commissioner*, 214 F. 2d 478 (2d Cir. 1954); I BOGERT, TRUSTS AND TRUSTEES § 45 (2d ed. 1965); I SCOTT, TRUSTS § 23 (3d ed. 1967); RESTATEMENT (SECOND) OF TRUSTS § 23 (1959). It is clear here that there was no intent shown on the part of either the lot owners or the Cemetery Company to create a trust with the percentage of the proceeds from lot sales. No agreement, either written or oral, was present between the parties to evidence the requisite intent to create a trust.

The government points to language in the Act of Incorporation to show an intent by the Illinois legislature to create a trust. Specifically it notes that Section 4 permits the trustees of plaintiff to adopt such regulations as will be needful for the proper management of the "affairs of their *trust*." (Emphasis supplied.) The fact that the Act does not name a beneficiary or "show a desire to pass benefits through the medium of a trust and not through some related or similar device," I BOGERT, TRUSTS AND TRUSTEES § 46 at 324 (2d ed. 1965), is strong evidence that the use of the term "trust" in Section 4 is made to describe merely the fiduciary duty of care that the Board of Trustees have to the funds received from the Cemetery Company and not to create a legally enforceable trust.

As further evidence of a lack of intent on the part of all parties to create a trust out of the proceeds of lot sales is

the historical treatment of these funds. Since 1943, when the IRS ruled that the plaintiff could not claim an exemption as a cemetery company, the plaintiff has consistently filed a Form 1120, U.S. Corporate Income Tax Return, reporting as corporate income the funds paid to plaintiff from the proceeds of lot sales. It was not until the present contested tax deficiency assessment occurred that the IRS questioned the plaintiff's categorization of the funds. Although the IRS is always free to change its interpretation of the tax code as applicable to a given situation, where tax liability is dependent on an interpretation of a party's intent a long course of conduct is highly relevant. The fact that for 25 years the plaintiff has treated these proceeds as corporate income not as trust funds and has filed a corporate income tax return which has been accepted by the IRS is highly probative if not dispositive of the issue of whether there was originally an intent to set up a trust fund out of these proceeds.

For all of the aforementioned reasons we hold that neither the Cemetery Company nor the individual lot owners intended for the fund created from the ten percent of proceeds from lot sales to be a trust, and, therefore, those funds contained in the General Fund account should be treated as corporate assets of the plaintiff and taxed accordingly.

B—*Marshall Field Fund*

In addition to the General Fund the IRS allocated income to an alleged second trust, the Marshall Field Fund, representing payments made for the care of an individual lot as provided for by Section 9 of the Act of Incorporation. The Marshall Field Fund represents but one of many funds created for the purpose of maintaining a particular lot. By 1965, there were 2,416 other lots being cared for under this section; funds for 78.6 percent of the lots were received prior to 1947. Each owner was told that if he contributed a predetermined minimum amount of money he would be relieved of yearly maintenance charges and the particular lot would be cared for in perpetuity. Presumably if the government is successful in this suit each of the 2,416 separate contributions made under Section 9 would be deemed independent taxable trust entities, and each would be required to file its

own federal income tax return, and where the income from investments is large enough, pay federal taxes.

For bookkeeping purposes, the amounts received from lot owners pursuant to Section 9 of the Act of Incorporation are recorded under the heading "Lot Owners' Funds" and subsequently posted in a ledger called the "Cash Book." Each year, under an accounting system set up by an independent certified public accountant and not required by the Act of Incorporation, income from investments of the Section 9 funds is allocated on a pro rata basis to each individual lot being separately cared for. The plaintiff, however, at no time sent financial statements to the lot owners nor consulted with them on investments.

As in the case of the General Fund, the critical element as to whether a trust was set up for each Section 9 contribution is the intent of the parties. No change of interpretation or tax philosophy by the IRS can make corporate assets of the plaintiff into trust funds where the parties never intended the creation of a trust. *See Oak Woods Cemetery Ass'n.* v. *United States*, *supra;* RESTATEMENT (SECOND) OF TRUSTS § 23 (1959). Nothing in the communication between the lot owners and the plaintiff points to an understanding or intent that the funds are to be held in trust. Certainly the fact that for 25 years plaintiff considered them to be corporate assets and consistently dealt with them as such on its corporate income tax return, should strongly indicate the absence of an intent to form a trust. The IRS' acquiescence in this approach for those twenty-five years might further indicate the reasonableness of the inference that these funds were not part of a trust.

As further evidence of the lack of intent by any party to create a trust with these funds, is the fact that no where in the Act of Incorporation or in the lot owners' dealing with the plaintiff are beneficiaries of this alleged trust named. With the exception of resulting trusts, constructive trusts or charitable trusts, none of which are allegedly present in this case, the absence of a beneficiary is critical to the existence of a trust. See RESTATEMENT (SECOND) OF TRUSTS § 112 (1959) where it is stated:

> A trust is not created unless there is a beneficiary who is definitely ascertained at the time of the creation of

the trust or definitely ascertainable within the period of the rule against perpetuities. [*Id.* at 243.]

See also II SCOTT, TRUSTS § 112 at 873 (3d ed. 1967).

The government points to the language of Section 9 to show that under the Act of Incorporation the parties were required to consider these payments as being made in trust:

> Sec. 9. Said Trustees may receive and hold any grant, donation or bequest of property, *upon trust*, to apply the same, or the income thereof, to the improvement or embellishment of the said cemetery or any particular lot or lots therein * * *. [Emphasis supplied.]

The mere fact however that the Act uses the words "upon trust" does not by itself mean that the money so received was a trust. *See Oak Woods Cemetery Ass'n., supra; Costello* v. *Hillcrest State Bank of University Park*, 380 S.W. 2d 780 (Tex. Civ. App. 1964). In *Oak Woods Cemetery Ass'n.* v. *United States*, *supra*, the court held that money set aside by a special chartered Illinois cemetery company for care and maintenance was not held in trust even though the agreement between the lot owners and the company stated:

> [Oak Woods] "shall set apart the amount of said principal sum and shall forever hold the same, *in trust*, for investment for the permanent improvement of and keeping up in good order said cemetery, * * *." [Emphasis in original.] [345 F. 2d at 364.]

Despite this apparently clear language, the court nevertheless held:

> It is our view that because Oak Woods put these funds apart from the general funds, a trust was not thereby created. It was more a matter of careful corporate financial conduct. [*Id.* at 364.]

Similarly, in *Costello* v. *Hillcrest State Bank of University Park*, *supra*, the court decided that the fact that a deed to property was made out to "Jim Costello, Trustee" did not necessarily mean that an express trust was formed. The court said: "The mere use of the word 'Trustee' does not of itself *create* a trust * * *." [*Id.* at 782.] Thus, the particular language used in Section 9 is not determinative of whether the Marshall Field Fund and other funds created under this section are trusts. Where, as here, all other in-

dicia of trusts, such as an expression of intent, and the naming of beneficiaries, are missing it is evidence that the Section 9 contributions do not represent a trust.

Not only are some basic requirements of a trust missing, but the Act of Incorporation permits the plaintiff to take steps which are inconsistent with the duties placed on a trustee of a trust. Section 7 states that where the fund for the general care and maintenance of the cemetery created out of the percentage of proceeds paid to the plaintiff by the Cemetery Company is "at any time diminished by loss or depreciation of securities, the same shall be immediately made good from *any* other funds coming to the hands of said Trustees * * *," including presumably money received under Section 9. Such commingling of funds, is, under normal trust law a breach of fiduciary duty by a trustee. *Harris Trust & Savings Bank* v. *Wanner*, 326 Ill. App. 307, 61 N.E. 2d 860 (1945), *aff'd*, 393 Ill. 598, 66 N.E. 2d 867 (1946). By permitting plaintiff to commingle funds received for the perpetual care of an individual lot, it would seem that the Illinois legislature did not envision that those funds would be considered held in trust.

For all of the aforementioned reasons we hold that the Marshall Field Fund is not a trust but instead a corporate asset of the plaintiff subject to appropriate corporate tax treatment.

C—*The Lot Owners' Fund*

The IRS further attempted to allocate income, originally claimed by the plaintiff, to a third entity, the "Lot Owners' Fund," representing an association of "trusts" created by contributions under Section 9, such as the Marshall Field Fund, and taxable as a corporation. The government asserted that since Section 8 permitted the commingling for investment purposes of funds received for individual lot care, the individual trusts allegedly formed from each contribution were engaged in a joint investment venture and taxable as a corporation under section 7701(a)(3) of the Internal Revenue Code of 1954.

The Internal Revenue Code defines in section 7701(a)(3) organizations taxable as corporations to include "associations, joint-stock companies, and insurance companies." In

our recent case, *Outlaw* v. *United States*, 204 Ct. Cl. 152, 494 F. 2d 1376 (1974), *cert. denied*, 419 U.S. 844 we enumerated the criteria for defining an association taxable as a corporation within this section as follows:

> * * * It is clear from * * * [the case of *Morrissey* v. *Commissioner*, 296 U.S. 344 (1935)] and the Regulations that an association will be taxed as a corporation rather than as a general trust or a partnership if it has the following characteristics:
>
> 1. Associates.
> 2. An objective to carry on business and divide the gains therefrom.
> 3. Continuity of Life.
> 4. Centralization of Management.
> 5. Liability for Corporate debts limited to corporate property.
> 6. Free Transferability of Interests. [*Id.* at 160–61, 494 F. 2d at 1380.]

The tax regulations further state that the first two requirements, associates and a joint business objective, are most essential; the absence of either one prevents an organization from being called an "association" and being taxed as a corporation. Treas. Reg. § 301.7701–2(a)(2). As the Supreme Court stated in *Morrissey* v. *Commissioner*, 296 U.S. 344 (1935):

> 3. "Association" implies associates. It implies the entering into a joint enterprise, and, as the applicable regulation imports, an enterprise for the transaction of business. * * * [296 U.S. at 356.]

It is apparent to us that the Lot Owners' Fund fails to meet both of these two determinative essential requirements, *i.e.*, it does not comprise associates and there is no discernible objective on the part of alleged "associates" to carry on business and divide the gains, and therefore, it is not a taxable corporate entity under section 7701(a)(3).

The government in this case contends that the associates of this alleged association are the individual "trusts" formed from Section 9 contributions for the perpetual care of individual lots and not the lot owners themselves. It is hard to see how it can be said that an entity such as a trust, having no independent existence of its own, can be an associate or

have an objective to carry on a business for joint profit. Moreover, we have already decided that the Marshall Field Fund and all other funds created by contributions for the perpetual care of individual lots do not constitute separate trusts but rather are only corporate assets of the plaintiff. It therefore appears to us even more farfetched to say, as the government must, that a corporate asset can be an independent associate of an association or that it can have a business objective. For this reason we hold that the requirements enumerated in *Outlaw* v. *United States*, *supra*, and the associated Treasury Regulations are not met and the Lot Owners' Fund is not an association taxable as a corporation under section 7701(a)(3) of the Internal Reveue Code of 1954.

Since we hold that the three IRS created entities do not exist for tax purposes, we need not resolve the issue of whether the tax deficiencies assessed against them were timely made within the applicable statute of limitations.

III—*Deductions for Depreciation and Business Expenses*

Since we have decided that the plaintiff in the instant suit is not a tax exempt cemetery company within the meaning of section 501(c)(13) and that the various funds received by it are corporate assets and not independent trusts, we must now turn to the question of the validity of the deductions plaintiff made during the years in question.

On its federal corporate income tax returns, plaintiff deducted as ordinary and necessary business expenses, salaries paid to employees and money paid to the Cemetery Company for its general maintenance of Graceland Cemetery and for the particularized care requested by lot owners for their individual lots. The IRS disallowed all of the Improvement Fund's deductions with the exception of the salaries paid to plaintiff's employees. In addition, the Improvement Fund claimed deductions for the depreciation of improvements made on the chapel building, administrative building, barn and repair shops which it owned but leased to the Cemetery Company. The plaintiff also sought depreciation deductions on a portion of the brick wall and fence at the cemetery. These deductions were likewise denied plaintiff.

Section 162(a) permits a deduction for:

> * * * [A]ll the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, * * *. [26 U.S.C. § 162(a) (1964).]

What is an "ordinary" expense is defined on the basis of what is ordinary for a business having the nature and scope of the particular enterprise in question. *Anaheim Union Water Co.* v. *Commissioner*, 321 F. 2d 253, 258 (9th Cir. 1963). *See also Deputy* v. *duPont*, 308 U.S. 488 (1940). Similarly an expense will be considered necessary if it is appropriate and helpful in developing and maintaining the taxpayer's business. *Welch* v. *Helvering*, 290 U.S. 111 (1933).

The particular expenses disallowed in the present case were payments made to the Cemetery Company for such general maintenance of the cemetery as watering, mowing, or planting and also for the particularized care required by individual lot owners as a result of Section 9 payments. All of these expenses are of the type and scope usually associated with companies whose business it is to provide the care and upkeep of cemeteries, and who would clearly be allowed to take a section 162(a) deduction for them. We see no reason why the present plaintiff should be treated any differently. It appears to us to be inconsistent to permit plaintiff to deduct the salaries of employees whose responsibility it is to supervise the care and maintenance of the cemetery and then to deny a deduction for the cost of having that work done by the Cemetery Company.

As an adjunct to a profit-making cemetery company, the money paid by plaintiff is directly applied to cemetery care expenses. The Improvement Fund supervises all of the care and maintenance work done and is directly billed for it by the Cemetery Company. The stipulated facts indicate that the amount charged the plaintiff by the Cemetery Company for this work is both fair and reasonable in the light of prices charged by other cemetery companies in the immediate area. Since plaintiff is charged by its Act of Incorporation with the preservation and maintenance of Graceland Cemetery, these expenditures are clearly within its mandated responsibilities, and, therefore, should be considered as valid trade and business expenses under section 162.

Nor do we believe that the absence of a profit motive by the nonprofit Improvement Fund is fatal to permitting a deduction under section ~~162~~ as the government contends. ~~The profit factor is really only significant insofar as it is a means of distinguishing between an enterprise carried on in good faith as a "trade or business" and an enterprise carried on merely as a hobby. 4 A MERTENS, LAW OF FEDERAL INCOME TAXATION § 25.08 (1972)~~* In the present case there is nothing to indicate that the plaintiff is maintaining its perpetual care funds as a hobby rather than as a trade or business. ~~Given the particular circumstances of this case, the fact that plaintiff is a nonprofit enterprise should be irrelevant to whether a trade or business expense deduction will be allowed. See Anaheim Union Water Co. v. Commissioner, supra.~~*

~~In Anaheim Union Water Co. the IRS questioned whether a nonprofit water company could deduct expenses in excess of revenues obtained from the sale of water. The court dismissed the government's theory that the water company could not deduct expenditures made where there was no expectation that they would be recovered through sales profits. Critical to its decision was the fact that the company's charter provided that all income was to be used to furnish water without profit.~~*

We therefore hold that the plaintiff should be allowed to deduct as ordinary and necessary business expenses those costs related to the care and maintenance of Graceland Cemetery.

Similarly, we find that there is no reason why plaintiff should not be allowed depreciation on the capital improvement of cemetery property which it owns and leases to the Cemetery Company. Section 167 of the Internal Revenue Code of 1954 states:

> (a) General rule.
>
> There shall be allowed as a depreciation deduction a reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence)—
>
> (1) of property used in the trade or business, or
>
> (2) of property held for the production of income.
>
> [26 U.S.C. § 167(a) (1964).]

*See Order amending opinion, *post*, at 901.

The plaintiff had title since 1935 to the chapel building, administrative building, barn, and repair shop as well as the brick wall and fence. Under the terms of the 1935 agreement, the Improvement Fund leased these structures to the Cemetery Company. In its income tax returns for the years in question, plaintiff sought to depreciate the cost to it of capital improvements made on this property. The issue is thus whether the particular assets are to be considered as property used in the plaintiff's trade or business.

Under Section 8 of the Act of Incorporation the Improvement Fund is obligated to use its income in "* * * the improvement, * * * and maintenance of the grounds, * * * enclosures, structures, monuments and memorials, and any and all other things in and about said cemetery which do now or may hereafter appertain to the same or belong to said Graceland Cemetery Company * * *." It seems clear to us that the particular improvements to the property owned by plaintiff for which depreciation is sought here are authorized by the Act of Incorporation and is therefore within the trade or business in which plaintiff participates. That plaintiff is an adjunct to a cemetery company is further evidence that the improvements to buildings used in the running of a cemetery should be depreciable as being part of plaintiff's trade or business. The fact that plaintiff leased the structures to the Cemetery Company should be of no significance since in general a lessor may depreciate property subject to a bona fide lease. *North Carolina Midland Ry.* v. *United States*, 143 Ct. Cl. 30, 163 F. Supp. 610 (1958); *cf. Kearney & Trecker Corp.* v. *United States*, 195 F. Supp. 158 (E.D. Wis. 1961). It is important to note that the Cemetery Company at no time claimed depreciation on this property although it is apparent that had they paid for the improvements the IRS would have allowed them a depreciation deduction. See section 178 of the Internal Revenue Code of 1954. *See also Glazer Steel Corp.* v. *United States*, 181 Ct. Cl. 1063, 388 F. 2d 990 (1967). Since the property would normally be depreciable and since it comes within the scope of plaintiff's business as defined by its Act of Incorporation, we hold that plaintiff should be allowed a section 167 depreciation deduction on the capital improvements in question. The government has never ques-

tioned the manner in which plaintiff calculated the depreciation, and, therefore, we would hold it to be fair and reasonable.

IV—*Motion to Amend Stipulation*

We must deny the government's motion to amend the stipulation made after oral argument in this court. Although we could dismiss the motion on the ground that mutual consent to accept the stipulation change is absent, a more cogent reason for dismissal is that the proposed amendment to the stipulation, dealing as it does with the Marshall Field Fund, is irrelevant in the light of our holding above in section II B.

V—*Summary*

In summary, we hold that plaintiff is not a tax exempt cemetery company within the meaning of section 501(c)(13) of the Internal Revenue Code of 1954, but rather, is an adjunct of a profit-making company and takes on the latter's taxable status. We also hold that the funds received by plaintiff as a percentage of lot sales and the funds received under Section 9 for care of particular lots are to be taxed as part of plaintiff's corporate assets. Similarly, we hold that the Section 9 payments do not constitute an association for tax purposes. Because we find that these three entities, known as the General Fund, Marshall Field Fund, and Lot Owners' Fund, created by the IRS, do not exist we must dismiss the individual petitions for refunds that were filed in their names and the taxes that were collected from them must be refunded to the plaintiff. Lastly, we hold that plaintiff should be allowed to deduct as a necessary and ordinary business expense all payments made for cemetery care and upkeep, and in addition, it should be allowed a depreciation deduction on property owned by it and used in the business of maintaining a cemetery, and on capital additions thereto.

CONCLUSION OF LAW

Upon the foregoing opinion which includes the necessary facts made as a part of the judgment herein, and the facts as stipulated by the parties, the court concludes as a matter

of law that the plaintiff is entitled to a refund of all taxes claimed in its petition, together with interest thereon, in accordance with this opinion, except the taxes claimed as a tax exempt corporation, and judgment is entered accordingly. That portion of plaintiff's petition claiming a refund of taxes as a tax exempt corporation is denied and to that extent its petition is dismissed. The assessments of taxes by defendant against the alleged trusts described in plaintiff's protective petitions in causes Nos. 447–69; 448–69; and 449–69, known as the "General Fund," the "Marshall Field Fund" and "Lot Owners' Fund" are set aside and declared to be null and void because such trusts did not exist, as shown by our opinion, and plaintiff is entitled to a refund of all taxes collected by defendant on such assessments (which do not duplicate other taxes to be refunded to plaintiff), together with interest thereon, and plaintiff's said protective petitions for such alleged trusts are dismissed. Defendant's motion to amend the stipulated facts is denied. The case is remanded to the trial judge for a determination of the amount of plaintiff's recovery in accordance with Rule 131(c)(2).

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513 F. 2d 603

ROBERT J. HOOVER v. THE UNITED STATES

[No. 457–73. Decided April 16, 1975]

ON PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

Civilian pay; dismissal; falsification of income tax returns; Internal Revenue employee.—Plaintiff, a tax technician with the Internal Revenue Service, was served with a notice of proposed adverse action which alleged, with appropriate specifications, that his 1968 and 1969 federal income tax returns claimed deductions to which he was not entitled, e.g. payments to doctors and dentists, moving expenses, contributions, taxes and union dues. Plaintiff filed a written response and made an oral reply; the District Director upheld the reasons and specifications in the notice and ordered plaintiff's separation; plaintiff appealed unsuccessfully to the Regional Commissioner of the Service, the Regional Office of the Civil Service Commission, and the CSC Board of Appeals and Review; and thereafter filed this suit seeking review of the administrative pro-

Syllabus

ceedings and decisions, restoration to his former position and back pay for the period of his alleged improper removal. The court is satisfied from the record that the case was pursued in both the Internal Revenue Service and Civil Service Commission on the theory that plaintiff could not be separated unless there was proof and a finding that his actions in taking the deductions were deliberate (in the sense that he knew he was not entitled to them) or at least grossly reckless and grossly negligent, without any concern whether or not he could properly take the deductions. It is *held* that, as to the major charges, there was solid and substantial supporting evidence for the administrative findings of culpability; that none of the procedural complaints levied against the charges and the administrative proceedings is sufficient to vitiate the determination of removal; and that it was not an abuse of discretion to separate plaintiff. Plaintiff's motion for summary judgment is denied, defendant's cross-motion is granted, and the petition is dismissed.

Civilian pay; charges and reasons for dismissal; sufficiency of charges.

[1] Although plaintiff was charged only with taking incorrect deductions on his income tax returns, with appropriate specifications of such deductions, the record shows that (1) management asserted throughout the administrative proceedings that plaintiff could not be separated unless his erroneous deductions were shown to be deliberate or the result of gross recklessness, and also (2) since he was a tax technician responsible for auditing income tax returns of others and was fully aware of his responsibility as a taxpayer to accurately declare deductions supportable by appropriate records on his own tax returns, plaintiff understood the crux of the allegations against him and was not misled by the possibility that he was merely being charged with having made innocent or negligent errors in his returns. Plaintiff's separation was justified where the administrative proceedings demonstrated that there was solid and substantial evidence to support the findings of culpability and that his actions in taking the deductions were deliberate or at least grossly reckless and grossly negligent without concern whether or not he could properly take them.

Internal Revenue ⇐ 1221

Civilian pay; adverse personnel action; efficiency of service, promotion of.

[2] The general standard of promoting the efficiency of the service is adequate for removal or discipline of a civilian Government employee and covers the charge of deliberately or recklessly taking improper deductions. This is particularly so where the employee is an Internal Revenue tax technician responsible for overseeing tax returns of others. The Internal Revenue Service is rightly concerned with its image of honesty and integrity.

Internal Revenue ⇐ 1221

Civilian pay; hearings; witnesses, production of; agency level hearing.

[3] No ground exists for questioning the ruling of the Internal Revenue Service hearing examiner that management was justified in not producing the witnesses requested by plaintiff at his hearing on dismissal charges, where several of the persons requested had no knowledge of the relevant issues, some were no longer in IRS employ, no showing was made that others whom plaintiff demanded to talk about penalties imposed by IRS in adverse action cases had knowledge of cases directly comparable to plaintiff's and where plaintiff had full opportunity to cross-examine the IRS inspector who gave the crucial testimony against him.

Internal Revenue ⇐ 1221

Civilian pay; adverse personnel action; investigation; generally.

[4] Although plaintiff's tax returns may have originally been made subject to audit because of suspicion of accepting a bribe, it is not unusual for an inquiry set off by one particular matter, which is later found to be groundless, to turn up evidence of other unrelated misconduct which then becomes the foundation for well-supported adverse action proceedings.

United States ⇐ 36

Civilian pay; adverse personnel action; documents relied on; production of.

[5] Regulations require the employee in an adverse personnel proceeding to be supplied only with the material relied on by the agency to support the reasons in the notice of proposed adverse action (5 C.F.R. § 752.202(a)(2) (1974)).

United States ⇐ 36

Civilian pay; adverse personnel action; administrative discretion; penalty, measure of.

[6] The measure of the penalty imposed on a civilian employee for infraction of agency rules is within the discretion of the agency. Where plaintiff, a tax technician responsible for auditing income tax returns of others, was found to have culpably made, for his own benefit, overstatements of the very kind taxpayers are regularly warned against, the penalty of removal from his position was not too severe.

Internal Revenue ⇐ 1221

Fred W. Field, attorney of record, for plaintiff.

Kenneth J. Ingram, with whom was *Assistant Attorney General Carla A. Hills*, for defendant.

Before DAVIS, KASHIWA, and KUNZIG, *Judges*.

DAVIS, *Judge*, delivered the opinion of the court:

Claimant Robert J. Hoover, a tax technician in the Internal Revenue Service, had had twenty-six years of federal employment and about a decade in the Revenue Service when he received, in March 1972, a notice of charges looking toward his removal from the IRS. This letter alleged, with appropriate specifications, that he had filed his federal income tax returns for 1968 and 1969 claiming deductions to which he was not entitled. Plaintiff put in a written response and also made an oral reply. The District Director upheld the reasons and specifications in the notice of adverse action and ordered that Hoover be separated from his position on May 12, 1972.

Plaintiff appealed to the Regional Commissioner of the Service and was granted a formal hearing within the agency. The appeals examiner who presided at this hearing recommended that the adverse action be sustained, and this suggestion was followed by the Regional Commissioner.

Plaintiff then appealed to the Regional Office of the Civil Service Commission which accorded him another hearing, this time before a civil service appeals examiner. The Regional Office upheld the removal, and on further appeal to the Board of Appeals and Review, this was affirmed in June 1973. This suit was then brought to review the administrative proceedings and decisions. Both parties have moved for summary judgment and there is no request that further evidence be taken in this court.

The charges sustained by the Civil Service Commission were that (a) in his tax return for 1968 plaintiff claimed deductions to which he was not entitled with respect to payments to doctors and dentists, contributions, and interest paid, and (b) in his 1969 return he claimed deductions (again, to which he was not entitled) for medical and dental expenses, moving expenses, contributions, taxes, and union dues. There is no contest that these deductions were incorrect, but Hoover urges that even an IRS employee cannot be removed merely for making mistakes on his returns.

This contention has given us some pause because the letter of proposed adverse action does not explicitly charge anything more than that the deductions were incorrect. We are satisfied from the record, however, that the case was actually

pursued in both the IRS and the Civil Service Commission on the theory that plaintiff could not be separated unless there was proof and a finding that his actions in taking the deductions were deliberate (in the sense that he knew he was not entitled to them) or at least grossly reckless and grossly negligent, without any concern whether or not he could properly take the deductions. The Board of Appeals and Review dealt with the contention "that the deductions claimed on his returns in 1968 and 1969, even though fictitious and incorrect, were caused by negligence on his part" by pointing out that "the evidence shows that what was involved here was not simply errors resulting from negligence" and that "the appellant was aware of the consequences which would result when the regulations of the Internal Revenue Service were violated * * *." The Commission's Regional Office said that "as a Tax Technician responsible for auditing the income tax returns of other citizens, the [plaintiff] was fully aware of his responsibility as a taxpayer to accurately declare deductions supportable by appropriate records on his own tax returns"; in addition, with respect to the major specification relating to medical deductions for 1968 the Office rejected the view that this was merely the result of negligence, characterizing it instead as "willful, culpable misconduct"; and with regard to plaintiff's claimed moving expenses for 1969, the Regional Office said that he "knowingly overstated the mileage difference in order to qualify for a moving expense deduction for 1969."[1]

[1] At the hearing within IRS, the management representative said that "what we have before you today is not a matter of mistake * * * nor is this case before you because Mr. Hoover incurred deficiencies," and later he said that it "is perfectly obvious we think that what we have here in at least some of these entries in the returns are not innocent errors but deliberate falsifications"; in discussing some of the individual specifications the management representative also made it clear that he was not talking about oversights, mistakes or innocent errors but about intentional or reckless falsifications.

At the separate Civil Service Commission hearing, the same management representative argued that the errors might be "inadvertent and innocent and accidental" if made by a person "not trained in tax matters" but "in the case of an experienced man like Bob Hoover, these errors have to be deliberate and they have to be willful"; he also said that "[t]here is no doubt in our minds that he deliberately took deductions to which he was not entitled," and with respect to the medical deductions he said: "This is not accidental. This has to be willful for someone in his position."

Not only was the case tried and determined on the basis that mere negligence would be insufficient cause for discipline, but at least as to the major charges there was solid and substantial supporting evidence for these findings of culpability. For 1968 plaintiff claimed $1,860 in medical and dental expenses; the Service audit allowed no deduction. The record shows that an IRS inspector contacted the five doctors listed on the return, or their employees, to discover what payments plaintiff had actually made. Three reported that they had no record of treating Hoover or any member of his family that year and received no money at all from him; the records of the other two showed that plaintiff had overstated his payments to one by $270 and to the other by $320 or $330. The total of the claimed payments for which there were no supporting records was $1,670. Plaintiff's excuse for the discrepancies is that he simply relied on his wife's bare recollection as to what payments she had made to doctors and dentists during 1968. It is clear, however, that as a knowledgeable tax technician Hoover knew that the IRS required supporting documentation before allowing such medical expenses to be deducted, and he never attempted to call the doctors or obtain some proof for his wife's casual recollection.

Probably the most damning evidence on this point is that for 1968 plaintiff deducted $375 for payments to a doctor who was his own personal physician, but that doctor's office indicated to the IRS inspector that Hoover had not been there at all since 1967. Plaintiff insisted that he had in fact visited this doctor many times in 1968 and had always paid in cash, but he had no receipts. The triers of fact were of course not compelled to credit his unsupported testimony or his explanation that the receipts were lost in a move he made in December 1969.[2]

The other main allegation against plaintiff concerned moving expenses ($382) he claimed for 1969. This deduction was taken, he said, because of a change in his driving to work. The return showed that the distance from his residence to

[2] The claimed medical expenses of $1,214 for 1969 were shown, through a similar inquiry made of the doctors, to be overstated by $692. Again, plaintiff did not attempt to verify the payments made, nor did he try to sustain them by records of any kind.

his new business location was 26 miles and the distance from his residence to his former business location was 5 miles. Moving expense deductions were not allowable for the 1969 tax year unless the difference between the two distances travelled was 20 miles or more. In fact, the actual change in the distance to Hoover's job caused by his move was only 3.5 miles. He admitted at the Commission hearing that, although the regulations plainly required the distances to be measured in straight lines, he had deliberately not used that method but had instead employed his own estimate of the time he spent on the road. This admission was clearly substantial enough support for the charge of deliberately creating a deduction where none could lawfully be taken.[3]

A barrage of procedural complaints is levied against the charges and the administrative proceedings, but none is sufficient to vitiate the determination of removal. We put to one side general arguments which have been authoritatively rejected, such as that the employee is entitled to all the protections of a criminal trial (*see Arnett* v. *Kennedy*, 416 U.S. 134 (1974)), and that hearsay is inadmissible (*see Peters* v. *United States*, 187 Ct. Cl. 63, 70–71, 408 F. 2d 719, 722–23 (1969)). The points we now consider are those tied specifically to these particular proceedings.

As we have already indicated, plaintiff understood and was made to understand the crux of the allegations against him, and was not misled by the possibility that he was merely being charged with having made innocent or negligent errors in his tax returns. It is settled, too, that the general standard of promoting the efficiency of the service is adequate for removal or discipline (*Arnett* v. *Kennedy*, *supra*, 416 U.S. 134, 161 (1974)), and in this instance we think that there can be no doubt that it promotes the efficiency of the civil service to proceed against an IRS tax technician—responsible for overseeing other taxpayers' returns—who deliberately or recklessly overstates his own deductions. "The IRS is rightly concerned with its image of honesty and integrity. Members of the public, who must turn square con-

[3] We do not canvass the evidence with respect to the lesser specifications since we are of the view that the administrative decision can be supported on the major charges relating to the medical and dental deductions for 1968 and 1969, and to the moving-expense deduction for 1969.

ners in tax matters, demand no less of revenue officials." *Birnholz* v. *United States*, 199 Ct. Cl. 532, 537 (1972); *see also Kandall* v. *United States*, 186 Ct. Cl. 900, 935, *cert. denied*, 396 U.S. 837 (1969). Promotion of the "efficiency of the service" is not restricted to testing the employee's work-efficiency or his performance on the job. *See Arnett* v. *Kennedy*, *supra*.

There is an accusation that witnesses plaintiff wished to call at the IRS hearing were not produced by management. No good ground exists for questioning the rulings on this point of the examiner who presided at that hearing. Several of these persons had no knowledge of any of the relevant issues; some were no longer in IRS employ; others were demanded in order to talk about penalties imposed by IRS in adverse action cases but there was no showing that any of them had knowledge of cases directly comparable to plaintiff's. One witness, who had audited Hoover's return, was made available but was not called either at the IRS or at the Civil Service Commission hearing. It is clear that, at the latter, plaintiff had available any IRS witnesses he had indicated he desired, but his representative failed to call most of them. It is also plain that he had full opportunity to cross-examine the IRS inspector (the only management witness at either hearing) who gave the crucial testimony against him.

Other scattershot charges against the proceedings are either unproved or irrelevant to the agency's and the Commission's final determination. The suggestion is made that the IRS first suspected that plaintiff was guilty of accepting a bribe, and that this accusation colored and tainted the whole adverse action proceeding. Although plaintiff's tax returns may have originally been made subject to audit because of this suspicion, the fact is that he was never charged with bribery, no attempt was made to prove or suggest that he had engaged in such misconduct, and he was early told that he had been cleared of suspicion of bribery. Nor does the record show that this initial suspicion motivated the later adverse action proceeding or the removal. It is not unusual for an inquiry set off by one particular matter, which is later found to be groundless, to turn up evidence of other

unrelated misconduct which then becomes the foundation for well-supported adverse action proceedings.[4]

It is also said that the IRS inspector refused to allow plaintiff to have a union representative with him at the interview with the inspector (prior to the issuance of the letter of charges). If this was so, it was immaterial to the determination of the formal adverse action proceedings which did not rest in any significant sense on statements or admissions made by plaintiff to the inspector. Another claim is that claimant was entitled, in the proceedings following the letter of charges, to see all of the inspector's report, even that portion which was unconnected with the charges actually made. The answer is that the regulations require the employee to be supplied only with "the material * * * relied on [by the agency] to support the reasons in that notice" (5 C.F.R. 752.202(a)(2) (1974))—and that was done here.

Bias is alleged on the part of the oral reply officer but there is no warrant in the record for this accusation, and plaintiff's representative admitted at the close of that meeting that "We had our opportunity to say everything that we hoped to say." A separate charge of bias against the IRS hearing examiner is likewise unsustained by the record, as the Civil Service Commission found. The further allegation that that examiner should have disqualified himself because he and the management representative had once attended a school together is obviously frivolous.

We come finally to the point that the penalty of removal was too severe for the offense, especially in view of plaintiff's twenty-six years of federal service and eleven years in the IRS. This is a furrow which has been well plowed in recent years. *See Grover* v. *United States*, 200 Ct. Cl. 337, 353–54 (1973), and cases cited. In this case we cannot say that there is an inherent or gross disproportion between the punishment of removal and the offense of an IRS tax technician's knowingly or recklessly overstating his deductions in his personal return for his own tax benefit. In the words of the

[4] In this connection we agree with the Civil Service Commission that the record does not support plaintiff's claim that the IRS inspector put him under duress during an interview regarding his tax returns by implying a threat to accuse him of receiving a bribe in connection with a tax audit Hoover had performed.

Syllabus

Board of Appeals and Review: "As a Tax Technician the appellant was responsible for auditing the income tax returns of other citizens and to see that these citizens were complying with the laws of the Internal Revenue Service. However, the appellant in taking improper deductions did exactly what was his duty to prevent."

The record reveals more than substantial evidence to show that he knew he was doing wrong. Certainly there is no excuse for his claiming considerable medical payments to his own personal physician in 1968 when the evidence shows that he did not visit that doctor at all after 1967. The administrative agencies found, and could properly find, that this was not a case of mere sloppiness or negligence but a deliberate effort to decrease his tax in the expectation that his misstatements would not be discovered (or, if they were, that he would simply have to pay the difference in tax). As we have stressed, the "IRS is rightly concerned with its image of honesty and integrity" (*Birnholz* v. *United States*, *supra*, 199 Ct. Cl. 532, 537 (1972)). It was not an abuse of discretion to separate this tax official who was found to have culpably made, for his own benefit, overstatements of the very kind taxpayers are regularly warned against.

The plaintiff's motion for summary judgment is denied, the defendant's motion is granted, and the petition is dismissed.

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513 F. 2d 1383

THE UNITED STATES v. PUEBLO OF SAN ILDEFONSO, PUEBLO OF SANTO DOMINGO AND PUEBLO OF SANTA CLARA

Appeal No. 7-73

Ind. Cl. Comm. Docket Nos. 354, 355, 356

30 Ind. Cl. Comm. 234

[Decided April 16, 1975]

ON APPEAL FROM THE INDIAN CLAIMS COMMISSION

Indian claims; appeal from Indian Claims Commission; date of extinguishment of aboriginal title; joint aboriginal title; taking dates.—These three cases are before the court for resolution of common issues, i.e. whether the Indian Claims Commission erred (1) in ascertaining for valuation purposes the dates on which the

Syllabus

United States extinguished Indian title to appellees' ancestral lands in New Mexico, and (2) in holding, based upon a finding that the pueblos of Santo Domingo and of San Filipe held "joint aboriginal title" to 8,600 acres of land prior to June 13, 1902 when it was set aside by Executive Order for exclusive use of the pueblo of San Filipe, that the pueblo of Santo Domingo is entitled to recover compensation for the extinguishment of its Indian title interest in said tract. As to (1), the Commission determined that the lands conveyed to third persons under public land laws were "taken" as of the dates of entry (or patent dates re mineral claims), that the lands included in the Jemez Forest Reserve were "taken" on October 12, 1906 when the Reserve was created, and that the areas placed within the Taylor Grazing District were "taken" on June 12, 1941 when the district was established. In 1770 the Spanish Crown granted jointly to the neighboring pueblos of Santo Domingo and San Felipe a large area which they used in common up until June 13, 1902 when the President by Executive Order set apart the 8,600-acre tract as the San Filipe Indian Reservation. It is *held* (1) that the Commission did not err in refusing to adopt the Government's recommended 1858 date of taking since the latter has not shown that (a) there was any implication that Congress intended extinguishment of the Indians' aboriginal ownership rights when it passed the Act of December 22, 1858, or (b) that there was an intent on the part of the United States during the last half of the 19th century to make all of appellee Indians' aboriginal areas legally open to entry. There is insufficient factual basis in the record for the Government to draw persuasive support for the 1858 taking date from the fact that large areas of land acquired from Mexico were thrown open to white settlement; (2) that in view of all the factors involved, the Indians' aboriginal ownership was not completely extinguished in 1905 (allegedly because of non-Indian interference with the Indians' exclusive use and occupancy of the area) and the Commission did not err in refusing to select the Government's suggested 1905 valuation date; (3) that the various taking dates chosen by the Commission find rational support in the record; (4) that the Commission correctly held that the complete merger of two or more tribes into one is not a prerequisite for claiming joint aboriginal title; (5) that there is ample evidence in the record to support the conclusion that the pueblos of Santo Domingo and San Filipe jointly used and occupied the disputed 8,600-acre tract; and (6) that the United States is liable to the pueblo of Santo Domingo for the 1902 value of its interest in the San Filipe Reservation. The interlocutory orders and determinations appealed from are affirmed.

Indian claims; land; title to land; Indian title land; extinguishment of Indian title.

[1] Termination of Indian title is exclusively the province of the United States, the power of Congress being supreme.

Indians ⟸ 10

Syllabus

Indian claims; taking of Indian property; date of taking; generally.

[2] The time fixed for the taking of specific Indian lands depends upon the particular facts, circumstances and history of each case.

United States ⟸ 105

Indian claims; land; title to land; Indian title land; extinguishment of Indian title.

[3] Extinguishment of Indian title cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards.

Indians ⟸ 10

Indian claims; land; title to land; reservation or granted lands; creation of reservation; extinguishment of Indian aboriginal title.

[4] Creation of an Indian reservation does not invariably extinguish Indian aboriginal title claims to areas outside the boundaries of confirmed grants. Indian settlement on a reservation should be seen as an abandonment of claims only when the specific circumstances warrant that conclusion. Thus, where the sole purpose of the Act of December 22, 1858 was to formally approve and sanction the *bona fide* grants of lands to Indians of prior sovereigns to give effect to the 1848 Treaty of Guadelupe Hidalgo with Mexico and to authorize issuance of patents therefor, and where the Government has failed to show adequately that the 1858 Act was intended by Congress to extinguish Indian title lands outside the boundaries of the confirmed grants, or that the Indians agreed to renounce their aboriginal claims by accepting the patents, such acceptance by the Indians did not extinguish their aboriginal title to areas outside the patent boundaries.

Indians ⟸ 10

Indian claims; land; title to land; Indian title land; extinguishment of Indian title.

[5] The act of the Government in surveying lands and performing other deeds in anticipation of future white settlement does not in itself affect Indian aboriginal title to lands. Nor is the bare expectation that lands will be settled sometime in the future sufficient to deprive Indian dwellers of their aboriginal rights.

Indians ⟸ 10

Indian claims; land; title to land; Indian title land; extinguishment of Indian title.

[6] The impact of authorized white settlement upon the Indian way of life in aboriginal areas may serve as an important indicator of when aboriginal title was lost, but such authorized settlement is only one of various factors to be considered in determining when specific lands were taken. Under the circumstances here involved factors to be considered are: extent of authorized settlement in the Indians' aboriginal areas between 1870 and 1905 (together with the confirmed grants awarded by prior sovereigns), the declared policy in New Mexico of protecting unextinguished Indian title, the ab-

Syllabus

solute dearth of evidence indicating an express congressional purpose to abolish Indian title over the whole of the Indians' ancestral homelands, and the lack of any clear and convincing evidence from which to imply an intent to terminate the Indians' entire aboriginal ownership.

Indians ⟸ 10

Indian claims; taking of Indian property; date of taking; average date.

[7] Fixing a date for extinguishment of Indian title is not always an exact process—approximation must be tolerated. Where the record is devoid of any single occurrence or incident to serve as the extinguishment event, but rather the record indicates that the Government repeatedly dealt with the Indians' aboriginal lands on a piecemeal basis, allowing and sanctioning the intrusion over a period of several decades of white settlers and miners onto the lands, the Indian Claims Commission and the courts may resort to an average or composite valuation date.

United States ⟸ 105

Indian claims; Indian Claims Commission; discretion of Commission.

[8] The determinations of the Indian Claims Commission should be given great weight if reasonable. Thus, where the taking dates the Commission selected when third persons over a period of several decades entered the subject Indian lands under the public land laws, when patents were granted for mineral claims, and when aboriginal areas were included in the Jemez Forest Reserve and in the New Mexico Grazing District No. 1, had rational support in the record, the Commission did not overstep the limits of its permissible discretion.

United States ⟸ 113

Indian claims; land; title to land; Indian title land; proof of Indian title; generally.

[9] In order for an Indian claimant to prove aboriginal title, there must be a showing of actual, exclusive and continuous use and occupancy for a long time prior to the loss of the land.

United States ⟸ 113

Indian claims; Indian Claims Commission; appellate review by Court of Claims; findings of Commission; substantial evidence.

[10] Since the proof supporting an Indian claimant's aboriginal title involves factual questions, the findings of the Commission must be upheld by the Court of Claims on appeal if supported by substantial evidence.

United States ⟸ 113

Indian claims; land; title to land; Indian title land; joint ownership or occupancy.

[11] Generally, in order for an Indian tribe to establish ownership of land by so-called Indian title, it must show that it used and occupied the land to the exclusion of other Indian groups. However,

Opinion of the Court

two or more tribes or groups might inhabit a region in joint and amicable possession without destroying the "exclusive" nature of their use and occupancy and without defeating Indian title, and a complete merger of two or more tribes into one entity is not a prerequisite for claiming joint aboriginal title. Where the record evidence shows that in 1770 the Spanish Crown granted the neighboring pueblos of Santo Domingo and San Filipe, each a separate entity and owning its own respective separate lands, a large area of land lying between their respective holdings, that the pueblos believed they had joint title to the 8,600 acres here in dispute based upon their interpretation of said grant, that, although in 1898 the Court of Private Land Claims did not validate the entire claim of the two pueblos to ownership of the disputed area in joint tenancy under the 1770 grant it did validate an area contiguous to the 8,600-acre tract, and that they continued to believe that they jointly owned the disputed land up until June 13, 1902 when the President by Executive Order set apart the 8,600-acre tract as the San Filipe Indian Reservation, the two pueblos had joint aboriginal title to said tract.

Indians ⇐ 10

S. Bobo Dean, for appellees. *Darwin P. Kinsley, Jr.*, and *Karelsen & Karelsen*, attorneys of record for appellees. *Richard Schifter* and *Fried, Frank, Harris, Shriver & Kampelman*, of counsel.

A. Donald Mileur, with whom was *Assistant Attorney General Wallace H. Johnson*, for appellant. *Roberta Swartzendruber*, of counsel.

Before DURFEE, *Senior Judge*, DAVIS and SKELTON, *Judges*.

DURFEE, *Senior Judge*, delivered the opinion of the court:

These cases are before the court on an interlocutory appeal by the Government from a decision of the Indian Claims Commission, rendered on May 9, 1973, and reported in 30 Ind. Cl. Comm. 234 (1973). The three Indian pueblos of San Ildefonso, Santo Domingo and Santa Clara filed claims with the Commission, pursuant to clause 4 of section 2 of the Indian Claims Commission Act,[1] to recover compensation

[1] Title 25 U.S.C. § 70(a) (1970) provides, in pertinent part, as follows: "The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States * * * (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; * * *."

for the extinguishment of aboriginal title to their lands in northern New Mexico. Each pueblo's claim is separate and distinct; the claims are not consolidated, but have proceeded together for convenience in dealing with common issues.

The first issue we are asked to pass upon is whether the Claims Commission erred in ascertaining the dates on which the United States extinguished Indian title to appellees' ancestral lands. Prior to trial the parties entered into stipulations whereby it was agreed that each of the pueblos aboriginally and exclusively used and occupied certain areas delineated on maps by the Bureau of Land Management; it was further agreed that the United States is liable to each of the pueblos for extinguishing aboriginal title to those lands. Trial was held to determine the date or dates of "taking." Evaluating all the evidence, the Commission found that extinguishment of appellees' aboriginal occupancy areas was effected by (1) conveyances under the public land laws to various grantees at different times; (2) inclusion in the Jemez Forest Reserve;[2] and (3) inclusion in New Mexico Grazing District No. 1 created under the Taylor Grazing Act.[3] The lands conveyed to third persons under public land laws were held to have been "taken" as of the dates of entry (or, for mineral claims, as of the patent dates). The various parcels of Indian title lands included in the Jemez Forest Reserve were held "taken" on October 12, 1905, the date the Reserve was created. The areas placed within the Taylor Grazing District were held "taken" on June 12, 1941, the date the district was established.[4] The Government urges us to set aside these determinations and to substitute its recommended taking dates for those found by the Commission.

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[2] By proclamation of October 12, 1905, President Theodore Roosevelt established the Jemez Forest Reserve under the authority of section 24 of the Act of March 3, 1891, ch. 561, 26 Stat. 1103, as amended 16 U.S.C. § 471. By Executive Order of President Wilson, dated April 16, 1915, it was merged with the Pecos National Forest and the combined forest was named Santa Fe National Forest.

[3] Grazing District No. 1 in the state of New Mexico was established by order of the Secretary of the Interior on June 12, 1941, issued under the authority of section 1 of the Taylor Grazing Act, 43 U.S.C. 315. *See* 6 Fed. Reg. 3040 (1941).

[4] Certain areas of aboriginal title lands in the Santa Clara case which were not included in the original district were brought in by an order extending the district boundaries on December 14, 1944, and that date was held to be the proper valuation date for those areas.

Opinion of the Court

The second issue presented is whether the Commission erred in holding that the pueblo of Santo Domingo (plaintiff in Docket No. 355) is entitled to recover compensation for the extinguishment of its Indian title interest in a certain 8,600-acre tract of land. The Commission's holding is based upon a finding that the pueblo of Santo Domingo and the pueblo of San Filipe held "joint aboriginal title" to this tract prior to June 13, 1902, when it was set aside by Executive Order for the exclusive use of the San Filipe Indians. The Government attributes legal error to the Commission's reliance upon the principle of "joint aboriginal title;" it also challenges the sufficiency of the evidence to support the conclusion that the two Indian pueblos had exclusive use and possession of the 8,600-acre tract for a long period of time prior to 1902.

For the reasons which follow, we sustain the determinations of the Commission in all respects.

I. *Dates of Taking*

Dissatisfied with the valuation dates set down by the Commission, the Government has submitted two alternative theories as to when Indian title to appellees' aboriginal lands was extinguished. The first argument is that Congress manifested an intent to abolish aboriginal ownership to the lands in question by passage of the Act of July 22, 1854, 10 Stat. 308, and the Act of December 22, 1858, 11 Stat. 374. The Government's alternative position is that non-Indian interference with the appellees' exclusive use and occupancy of aboriginal title areas was so substantial by 1905 as to effectuate the destruction of aboriginal ownership no later than that year.

The task of setting a date for the extinguishment of Indian title must be approached with certain fundamental principles in mind. The threshold rule, of course, is that termination of Indian title is exclusively the province of the United States. *Oneida Indian Nation of New York* v. *County of Oneida*, 414 U.S. 661, 669 (1974); *United States* v. *Santa Fe Pacific RR.*, 314 U.S. 339, 347 (1941); *Johnson* v. *M'Intosh*, 21 U.S. (8 Wheat.) 543, 586 (1823). And in this regard, the "power of Congress * * * is supreme." *Santa*

Fe, *supra*, at 347. Another familiar principle is that the time fixed for the "taking" of specific lands depends upon the particular facts, circumstances and history of each case. *See Santa Fe*, *supra*, at 357–58. This court was compelled to give emphasis to this rudimentary point in its recent decision in *Turtle Mountain Band of Chippewa Indians* v. *United States*, 203 Ct. Cl. 426, 446, 490 F. 2d 935, 946 (1974), and *Gila River Pima-Maricopa Indian Community* v. *United States*, 204 Ct. Cl. 137, 142, 494 F. 2d 1386, 1389 (1974), *cert. denied*, 419 U.S. 1021. An additional doctrine embedded in Indian jurisprudence, observed by the Supreme Court in the *Sante Fe* case, is that "* * * an extinguishment cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards." *Id.*, at 354. These principles are the essential benchmarks which serve to guide our assessment of the Government's recommended dates of taking.

The Government says that Congress manifested an intent to extinguish appellees' aboriginal title in 1858. The starting point of the Government's analysis is the Act of July 22, 1854, 10 Stat. 308. By section 8 of that enactment Congress directed the Surveyor General for New Mexico "to ascertain the origin, nature, character, and extent of all claims to lands under the laws, usages, and customs of Spain and Mexico"; and "to make a full report on all such claims as originated before the cession of the territory to the United States by the treaty of Guadalupe Hidalgo * * * denoting the various grades of title, with his decision as to the validity or invalidity of each of the same under the laws, usages, and customs of the country before its cession to the United States"; and further to "make a report in regard to all pueblos existing in the Territory, showing the extent and locality of each, stating the number of inhabitants in the said pueblos, respectively, and the nature of their titles to the lands." The Act also provided that the "report shall be laid before Congress for such action thereon as may be deemed just and proper, with a view to confirm *bona fide* grants, and give full effect to the treaty * * *."

The Surveyor General submitted his report, dated September 30, 1856, wherein he recommended approval of the

claims of some 13 pueblos (including those of the pueblos involved in this action) to lands granted by prior sovereigns. These pueblo land grants were subsequently confirmed by Congress by the Act of December 22, 1858, 11 Stat. 374, and patents were authorized to issue "* * * as in ordinary cases to private individuals * * *." It is the Government's contention that the 1858 Congressional confirmation of these grants extinguished the aboriginal title of the pueblos to all outlying areas. Reliance is placed upon the *Santa Fe* decision of the Supreme Court, *supra*, where it was held that the creation in 1883 of the Walapais Indian Reservation at the request of the Walapais, and its acceptance by them, amounted to relinquishment of any tribal claims which they might have had to lands outside the reservation. The Government also directs our attention to numerous cases wherein the Claims Commission has held that the establishment of a reservation for an Indian tribe constitutes a relinquishment of aboriginal title claims outside of the reservation. It is argued that the 1858 Congressional confirmation of the grants of prior sovereigns was tantamount to the creation of a reservation for the pueblo Indians, and that Congress thereby manifested an intent to extinguish aboriginal title to all areas outside the boundaries of the confirmed grants.

It should be clear by now that the creation of an Indian reservation does not invariably extinguish aboriginal title claims to outlying areas. In *Santa Fe*, *supra*, the Supreme Court dispelled any notion that the establishment of a reservation automatically destroys Indian title claims based upon aboriginal ownership. *See id.*, at 351–56. As this court has most recently stated in *Gila River*, *supra*, 204 Ct. Cl. at 144, 494 F. 2d at 1390: "[t]here is no Procrustean rule that the creation of a reservation rigidly stamps out aboriginal rights." The particular facts and circumstances surrounding the establishment of a reservation in a given historical context may be such that that event will be deemed to have constituted a relinquishment of tribal claims to lands outside the reservation. But the rule to be followed, as succinctly and well stated by the court in *Turtle Mountain Band*, *supra*, 203 Ct. Cl. at 446, 490 F. 2d at 946, is that "* * * Indian settlement on a reservation should be seen as an abandon-

ment of claims only when the specific circumstances warrant that conclusion."

In the instant case, there is no indication that Congress had in mind the extinguishment of the pueblos' aboriginal ownership rights when it passed the Act of December 22, 1858. The sole purpose for that legislation was to formally approve and sanction the *bona fide* grants of prior sovereigns, and to authorize the issuance of patents therefor. Contrary to the Government's contention, the Act of December 22, 1858, did not "give" any lands to these pueblo Indians, but merely validated title to lands which the pueblos already owned. The United States was obliged under principles of international law to confirm the *bona fide* grants of prior sovereigns in order to give effect to the 1848 treaty with the Republic of Mexico. *See* Treaty of Guadalupe Hidalgo, Art. viii, 9 Stat. 922, 929 (1848); *Beard* v. *Federy*, 70 U.S. (3 Wall.) 478, 491–92 (1866). Thus the circumstances in this case are significantly different from the situation where the Government sets aside land for the establishment of an Indian reservation without any legal duty to do so. We agree with the conclusion of the Claims Commission that "[t]o hold, in these circumstances, that the plaintiffs' acceptance of the patents extinguished their aboriginal title to outlying areas would be equivalent to stating the United States made them pay for what they already owned and what it was already solemnly obligated to confirm." 30 Ind. Cl. Comm. at 239. Nowhere is there to be found any implication that Congress intended to exact the relinquishment of the pueblos' aboriginal rights as the price for confirming their land grants from prior sovereigns. Nor, turning the coin around, is there any proof that the pueblo Indians agreed to abandon aboriginal claims in their ancestral homeland by accepting the patents issued in confirmation of these grants. Indeed, the Commission specifically noted the Government's failure to show any actual abandonment in 1858 of lands previously used. 30 Ind. Cl. Comm. at 240.

As mentioned earlier, we are bound not to violate the Supreme Court's proscription against lightly implying an extinguishment of aboriginal title. *See Santa Fe*, *supra*, at

354. Since the Government has failed to adequately show that the 1858 confirmation of prior land grants was intended by Congress to extinguish Indian title lands outside the boundaries of the confirmed grants, or that the pueblo Indians agreed to renounce their aboriginal claims by accepting patents issued in confirmation of those grants, we cannot say that the Commission erred in refusing to adopt the Government's recommended 1858 date of taking. *Cf. Turtle Mountain Band*, *supra*, 203 Ct. Cl. at 447, 490 F. 2d at 947.

In an attempt to bolster its suggested taking date, the Government argues that after 1858 the Congress and the Executive Branch dealt with the pueblo aboriginal areas as part of the public domain. As evidence of this, the Government observes that all areas outside of those claimed under Mexican and Spanish grants (by Indian pueblos and by others) were opened up to white settlement by section 7 of the Act of July 22, 1854, 10 Stat. 308. Actual entries onto the pueblos' aboriginal areas did not occur, however, until 1870 and thereafter.

It will be observed, first of all, that during the second half of the 19th century, the national policy of respecting unextinguished aboriginal title was in effect in New Mexico. On May 31, 1884, the General Land Office adopted a circular instructing its field officers "to peremptorily refuse all entries and filings attempted to be made by others than the Indian occupants upon lands in the possession of Indians who have made improvements of any value whatever thereon." [5] When the circular was reissued in 1887, and again in 1903, it applied with respect to "* * * lands in the possession, occupation and use of Indian inhabitants, or covered by their homes and improvements." [6] The circular was made expressly applicable to "every land district * * * in any part of the public-land States and Territories." Moreover, when Congress established the Court of Private Land Claims

[5] *See* 3 Lands Decisions 371 (1884).

[6] *See* 6 Lands Decisions 341 (1887); Circulars and Regulations of the General Land Office, United States Government Printing Office, Washington: 1930, pp. 651–52: 43 C.F.R. § 2013.6 (1970). Contrary to the Government's assertion, the 1887 and 1903 circulars are not limited in application to lands on which improvements have been made.

in 1891 to pass on the validity of alleged Spanish and Mexican grants in New Mexico, it provided:

> No claim shall be allowed that shall interfere with or overthrow any just and unextinguished Indian title or right to any land or place [Act of March 3, 1891, c. 539, 26 Stat. 860].

It is our view that the Commission correctly concluded that there was no intent during the last half of the 19th century to make all of appellees' aboriginal areas legally open to entry.

But even if the aboriginal title areas of these pueblos were open to entry, it does not automatically follow that Indian title was destroyed prior to actual entries upon the various tracts of land. We know that the process of surveying lands and performing other deeds in anticipation of future white settlement does not itself affect Indian title. *Plamondon* v. *United States*, 199 Ct. Cl. 523, 528–29, 467 F. 2d 935, 937–38 (1972). Nor is the bare expectation that lands will be settled sometime in the future sufficient to deprive Indian dwellers of their aboriginal rights. *Gila River*, *supra*, 204 Ct. Cl. at 145, 494 F. 2d at 1391; *Cf. Lipan Apache Tribe* v. *United States*, 180 Ct. Cl. 487, 494 (1967). Making lands available for white settlement could, of course, in an appropriate factual context, constitute termination of aboriginal ownership. *See Gila River*, *supra*, 204 Ct. Cl. at 146, 494 F. 2d at 1391. But that result does not obtain in the present case. The opening of lands ceded by Mexico to white settlement was merely an act in recognition of the inevitable western migration and eventual settlement of white homesteaders. This formal acknowledgement that the territory acquired from Mexico would sooner or later be used and occupied by migrating white settlers does not translate into a present intention on the part of Congress to destroy Indian title. Nor does the opening of these lands to settlers under the public land laws signify, as the Government would have it, that Congress intended the 1858 confirmation of the pueblo land grants to effectuate the extinguishment of the Indians' aboriginal ownership rights. There is simply an insufficient factual basis in the record for the Government to draw persuasive support for its 1858 taking date from the fact that

large areas of land acquired from Mexico were thrown open to white settlement.

This brings us to the Government's second and alternative theory as to when appellees' Indian title was extinguished. The argument is that by 1905 the interruption of non-Indians—caused by white settlement under the public land laws together with land grants to non-Indians by prior sovereigns—had constituted such a "serious intervention" with the appellees' exclusive use and occupancy of their aboriginal title areas so as to effectuate an extinguishment over the entire area.

The first point to be made, of course, is that there are no fine spun or precise formulas for determining the end of aboriginal ownership. Unquestionably, the impact of authorized white settlement upon the Indian way of life in aboriginal areas may serve as an important indicator of when aboriginal title was lost. But such authorized settlement is only one of various factors to be considered in determining when specific lands were "taken." *Gila River*, *supra*, 204 Ct. Cl. at 146, 494 F. 2d at 1391.

The Government placed in evidence certain maps and excerpts from the records of the Bureau of Land Management showing the claims, applications, and entries on file prior to 1906. On the basis of all the evidence, the Commission found that there were fairly numerous intrusions into the western part of the San Ildefonso area and the southern and extreme eastern parts of the Santo Domingo area; that they consisted largely of coal declaratory statements and mineral entries; that in each case the parcels adversely claimed make up much less than one-half of the total acreage; that in the case of Santa Clara, there was intrusion into only one fractional section at the extreme northeastern corner of the aboriginal title area; and that the witness who compiled the maps and excerpts was unable to state which claims and entries went to patent, and which were cancelled, rejected, or abandoned. These determinations are not challenged on appeal. In view of the acknowledged national policy of respecting unextinguished Indian title, which was in effect in New Mexico, and in the absence of any clear and convincing evidence of an intent to extinguish the property

rights of the friendly farming Indians of the Southwest, the Commission inferred an intent on the part of the United States to protect the rights of these pueblo Indians. 30 Ind. Cl. Comm, at 242. Further, the Commission concluded, in the circumstances here involved, that the fact that some entries were allowed in the plaintiff's aboriginal areas is evidence of official negligence, or lack of knowledge of the plaintiffs' areas, rather than of an intent on the part of the United States to abolish their whole titles. 30 Ind. Cl. Comm. at 242. Accordingly, the Commission rejected the Government's theory that the appellees' Indian title to their entire aboriginal areas was extinguished by 1905.

The evidence presented to the Commission has been carefully examined, and the Government's argument in support of its proffered 1905 taking date has received serious consideration. We find ourselves in agreement with the Claims Commission that the Government failed to show the destruction of Indian title over appellees' entire aboriginal regions by 1905. Considering the various factors involved—including the extent of authorized settlement in the pueblos' aboriginal areas between 1870 and 1905 (together with the confirmed grants awarded by prior sovereigns), the declared policy in New Mexico of protecting unextinguished Indian title, the absolute dearth of evidence indicating an express Congressional purpose to abolish Indian title over the whole of appellees' ancestral homelands, and the lack of any clear and convincing evidence from which to imply an intent to terminate the pueblos' entire aboriginal ownership—we are unable to conclude that appellees' aboriginal ownership was completely extinguished by the year 1905. On the basis of the record before us, we cannot say that the Commission erred in refusing to select the Government's suggested 1905 valuation date.

As previously mentioned, the Commission ascertained that appellees' aboriginal lands were "taken" on the following occasions: (1) The several dates on which third persons entered lands conveyed to them under the public land laws (or the patent dates, with respect to mineral claims); (2) October 12, 1905, the date on which the Jemez Forest Reserve was created and various parcels of Indian title land

were included therein; and (3) June 12, 1941, the date on which pueblo areas were placed within the New Mexico Grazing District No. 1.

The Government attacks the method by which the Commission has determined when Indian title to the pueblo lands was extinguished. Specifically, the Government objects to the selection of the "multitude of scattered dates" when entries were made onto areas under the public land laws. The Government says that Indian or aboriginal title, by its nature, is not divisible into sections or quarter-sections, and it is not subject to extinguishment on a piecemeal, checkered basis. We are asked to ascribe error to the Commission's approach.

In each case, the Claims Commission weighs all the evidence and endeavors to determine at what point in time the United States extinguished aboriginal title to Indian lands. We must have a date (or dates) in order to place a value on the property taken, so that the Indian claimants can be compensated for the Government's past wrongs. The evidence in some cases will support a determination that at a specific point in time—on a date certain and definite—Congress clearly and unmistakenly manifested an intent to appropriate Indian lands and to wipe out all aboriginal rights. In other cases, the Congressional purpose is not so plainly exhibited; but the facts and circumstances in a given historical context may be such that the Commission, in its sound discretion, might reasonably and rationally choose a single date (or dates) as the most logical time to infer confiscation by the Government of all aboriginal lands. In still other cases, such as the one before us, the record is devoid of any single occurrence or incident to serve as the event when the United States decisively and all at once grasped a tribe's aboriginal ownership rights in their entirety. The fact is, of course, that the Government repeatedly dealt with Indian lands on a piecemeal basis. In the instant case, the United States allowed and sanctioned—over a period of several decades beginning around 1870—the intrusion of white settlers and miners onto appellees' aboriginal lands. The encroachment was gradual; the native Americans were displaced over a period of many years. In circumstances such as those presented here, it is entirely consistent with reality for the Com-

mission to find that aboriginal lands were "taken" on the dates of the various entries under the public land laws. Confronted with this type of record, the Commission has resorted to practical solutions. The parties have been encouraged to confer and agree upon an "average" valuation date, or a series of "average" dates, for the groups of dispositions made during successive periods. *See* 30 Ind. Cl. Comm. at 255. Such a procedure has received the sanction not only of this court, *United States* v. *Northern Paiute Nation*, 203 Ct. Cl. 468, 473, 490 F. 2d 954, 957 (1974), but of the Supreme Court as well. *Creek Nation* v. *United States*, 302 U.S. 620, 622 (1938). Fixing a date for the extinguishment of Indian title is not always an exact process; in this area of the law, approximations must be tolerated. The determinations of the Commission—the body primarily charged with the administration of the Indian Claims Commission Act—should be given great weight if reasonable. *Gila River*, *supra*, 204 Ct. Cl. at 150, 494 F. 2d at 1393.

The dates chosen by the Commission in the present case find rational support in the record. In selecting the dates on which third persons entered Indian lands under the public land laws—and in choosing the patent dates for mineral claims—the Commission has not overstepped the limits of its permissible discretion. We are satisfied that these dates, as well as the dates when aboriginal areas were included in the Jemez Forest Reserve and the New Mexico Grazing District No. 1, should serve as the applicable taking dates for determining the value of appellees' former lands.

II. *The San Filipe Indian Reservation*

The Indian Claims Commission determined that the pueblo of Santo Domingo and the pueblo of San Filipe held "joint aboriginal title" to a certain 8,600-acre tract of land, and that the United States extinguished the Santo Domingo one-half interest in the land on June 13, 1902, by the establishment of an Executive Order reservation for the exclusive use of the San Filipe Indians. The Commission concluded, accordingly, that the pueblo of Santo Domingo is entitled to recover compensation from the United States in an amount equal to one-

half of the fair market value of the 8,600 acres as of June 13, 1902.

It is appropriate to briefly recite certain historical facts and events which pertain to the land area in question. On September 10, 1770, representatives of the neighboring pueblos of Santo Domingo and San Filipe submitted a joint petition to the Spanish Governor and Captain General of New Mexico seeking to obtain a land grant from the Spanish Crown. It stated in pertinent part:

> * * * That whereas, we have some horned cattle, sheep and goats, and also herds of horses for the service of the King our Master (whom may God preserve) and not having sufficient lands on which to pasture the same; therefore we humbly request that your Excellency be pleased to cede to us in grant, in the name of the King our Master, whom may God preserve, a piece of land situate on the East side of the Rio del Norte, surplusage of each Pueblo, and bounded on the north by Lo de Vasques, on the South by the small spring of water called the bear spring, on the East, an ancient Pueblo called the Tunque Pueblo, and the West, the Rio del Norte, which piece of land comprises from North to South and from East to West, three quarters of a league * * *.

On the same day, the Spanish Governor and Captain General authorized a grant of the requested lands; and he executed a document which provided, in partinent part, as follows:

> * * * in view of the lands they ask in grant lying between the two Pueblos and that it would be very prejudicial to them should they be granted to any other individual: and the natives of the two Pueblos having been and are at all times ready to render to the King any service required of them, I, the said Governor and Captain General said, that I would grant and do grant in the name of his Majesty (whom may God preserve) the piece of land they apply for, equally between one and the other Pueblo, so that a league being measured to the South from the Pueblo of Santo Domingo, and another to the North of San Filipe, in the middle of the cultivable lands remaining, permanent landmarks shall be placed, in order that each Pueblo may observe its limits; and as respects the remaining pasture and wood lands,

> they shall be common to both of the aforesaid Pueblos, equally and without any preference * * *.

By the same document, the Spanish Governor and Captain General commissioned and empowered one Bartolome Fernandez, Chief Alcalde and War Captain of the Santo Domingo and San Filipe pueblos, to "give them possession in the customary form."

On September 20, 1770, Don Bartolome Fernandez entered onto the land in question together with the "principal Indians and authorities of the said Pueblos of Santo Domingo and San Filipe." Having read the grant, he measured the land and designated it to the Indians; he "gave them to understand that the pastures and watering places were to be in common to each one of the Pueblos and without preference to either of the Pueblos"; he "took them by the hand and conducted them over said land; they pulled up grass, threw stones to the four cardinal points and we all shouted in a loud voice three times, long live our King our Master, whom may God preserve * * *."

Since the lands which the two pueblos acquired from the Spanish Crown had never been surveyed, the exact extent of the 1770 grant was uncertain. The evidence in the record shows, however, that both groups of Indians understood the 1770 grant to encompass the 8,600 acres involved in this action, and that they used these lands in common for a long time. In 1898, the two pueblos jointly petitioned the Court of Private Land Claims to confirm their title to the land—including the disputed 8,600 acres—which they believed had been conveyed to them by the 1770 grant. The Court unanimously held that the joint grant was genuine and entitled to confirmation. However, a majority of the Court would confirm only an 1,100-acre tract situated in the northern part of the claimed area. Two Justices dissented from this part of the decision, holding that the Indians were entitled to a much larger area.[7] It is important to note that the tract confirmed by the Court of Private Land Claims is contiguous to the 8,600-acre tract here in dispute.

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[7] An appeal was filed in the Supreme Court on behalf of the two pueblos but was dismissed for lack of prosecution when Congress failed to appropriate funds for the salary of a Special Pueblo Attorney.

Shortly after the termination of proceedings in the Court of Private Land Claims, there were attempted encroachments upon the lands claimed by the two pueblos to be within the limits of the 1770 joint grant. On April 8, 1901, a Mexican named Julio Garduno made a homestead entry onto 147.90 acres of land lying largely within the 8,600-acre area involved in this action. The attorney who had represented the United States in the proceeding before the Court of Private Land Claims, W. H. Pope, wrote a letter on May 13, 1901, to the Commissioner of Indian Affairs, wherein he expressed his concern over the Garduno entry and other encroachments upon the lands being used by the two pueblos. Pope stated that while the Court of Private Land Claims was correct in confirming only 1,100 acres under the 1770 grant, the decision "undoubtedly leaves out a large amount of land that the Indians have claimed for many years." He pointed out that the lands taken by Garduno had been under the occupancy and cultivation of the Indians. Coal had been discovered in the vicinity, and it was Pope's belief that entries could be anticipated onto a large part of the premises claimed by the two pueblos but left out of their confirmation. "Should this be done," he observed, "it will be most unfortunate as it will lead to a number of controversies between these entrymen claiming under the United States and the Indians claiming under their ancient possession." Pope recommended that the unconfirmed portion of the lands claimed under the 1770 grant, including the 8,600 acres, be withheld from entry and further attempts to initiate or perfect title under the United States. It was suggested that the Department of Interior consider the question of a permanent reservation of these lands for the use and occupancy of the Santo Domingo and San Filipe pueblos.

The lands were temporaily withdrawn from entry and on April 25, 1902, the Secretary of the Interior instructed the Commissioner of Indian Affairs to investigate the matter of the proposed permanent reservation for the two pueblos. The investigation was conducted by Mr. Pope and one Ralph Collins, Superintendent of the Albuquerque Indian School Service, who together visited the lands in question in April of 1902. Both men recommended that the lands tem-

porarily withdrawn for the use and occupancy of the two pueblos should be set aside for the creation of a permanent reservation for the San Filipe Indians alone. In a report submitted to the Commissioner of Indian Affairs, dated May 2, 1902, Pope observed that "the land in question has been of great use to the Pueblos named" (Santo Domingo and San Filipe). He also stated that Garduno had "no equities which commend him to the Government, certainly none as against the Indians who have had possession of these lands for a very long time." The reason for suggesting the establishment of a reservation for the exclusive use of the San Filipe Indians was explained in the Pope report as follows:

> The Santo Domingos have already a very large holding and an amount of land entirely adequate for their purposes.

Pope also remarked that:

> If the Land Department prefers to make the reservation in favor of the pueblos jointly, I am of opinion that it will not lead to any serious complication as the two pueblos live in comparative amity.

On the basis of the Pope and Collins investigation, and upon their recommendation, the Acting Commissioner of Indian Affairs recommended that a reservation be created solely for the pueblo of San Filipe "as the Santo Domingo Pueblo has already sufficient lands for its requirements." He also recommended that the Garduno entry be held for cancellation. On June 13, 1902, President Theodore Roosevelt signed an Executive Order setting apart the 8,600-acre tract of land here in issue as the San Filipe Indian Reservation.

In light of the above-recited record of events, and on the basis of the other evidence of record, the Commission found that the Santo Domingos and the San Filipes believed, based upon their interpretation of the Spanish grant of 1770, that they had joint title to what is now the San Filipe Executive Order Reservation, and that from at least 1770 down to June 13, 1902, both groups of Indians used and occupied this 8600 acres of land in common. The Commission held that a true "joint aboriginal title" over these lands had been proven.

In order for an Indian claimant to prove aboriginal title, "[t]here must be a showing of actual, exclusive and continuous use and occupancy 'for a long time' prior to the loss of the land." *Confederated Tribes of the Warm Springs Reservation of Oregon* v. *United States*, 177 Ct. Cl. 184, 194 (1966). Proof of these elements involves factual questions, and the findings of the Commission must be upheld on appeal if supported by substantial evidence. *Six Nations* v. *United States*, 173 Ct. Cl. 899 (1965); *Red Lake, Pembina and White Earth Bands* v. *United States*, 164 Ct. Cl. 389 (1964); *Spokane Tribe of Indians* v. *United States*, 163 Ct. Cl. 58 (1963); *Sac and Fox Tribe of Indians* v. *United States*, 161 Ct. Cl. 189, 315 F. 2d 896, *cert. denied*, 375 U.S. 921 (1963). The parties here have focused their attention, and ours, on the requirement of showing "exclusive" occupancy and control over the lands claimed.

Implicit in the concept of ownership of property is the right to exclude others. Generally speaking, a true owner of land exercises full dominion and control over it; a true owner possesses the right to expel intruders. In order for an Indian tribe to establish ownership of land by so-called Indian title, it must show that it used and occupied the land to the exclusion of other Indian groups. True ownership of land by a tribe is called in question where the historical record of the region indicates that it was inhabited, controlled or wandered over by many tribes or groups. Ordinarily, where two or more tribes inhabit an area no tribe will satisfy the requirement of showing such "exclusive" use and occupancy as is necessary to establish ownership by Indian title. *See e.g.*, *Iowa Tribe of the Iowa Reservation in Kansas and Nebraska* v. *United States*, 195 Ct. Cl. 365 (1971), *cert. denied*, 404 U.S. 1017 (1972); *Six Nations*, *supra*; *Sac and Fox Tribe of Indians*, *supra*. However, this court has acknowledged, on several occasions, that two or more tribes or groups might inhabit a region in joint and amicable possession without destroying the "exclusive" nature of their use and occupancy, and without defeating Indian title. *Turtle Mountain Band*, *supra*, 203 Ct. Cl. at 442, 490 F. 2d at 944; *Iowa Tribe of the Iowa Reservation in Kansas and Nebraska*, *supra*, 195 Ct. Cl. at 370; *Confederated Tribes of the Warm*

Springs Reservation of Oregon, *supra*, 177 Ct. Cl. at 194 n. 6; *Sac and Fox Tribe of Indians*, *supra*, 161 Ct. Cl. at 202 n. 11, 315 F. 2d at 903 n. 11.

The Commission's reliance upon the principle of joint occupancy is assailed on two grounds. First, it is said that the pueblo of Santo Domingo and the pueblo of San Filipe were not a single or closely integrated entity and, therefore, as a matter of law, it was impossible for the two pueblos to have held joint Indian title. Second, it is argued that there are neither sufficient findings nor substantial evidence in this record to support a determination that the two pueblos jointly used and occupied the 8,600 acres in question for a long time.

The Commission specifically found that the two pueblos were "separate entities," rather than a "super-entity" for the purpose of holding joint title to the subject tract of land. Four members of the Commission do not believe that a complete merger of two tribes into one entity is a prerequisite for applying the principle of joint occupancy. 30 Ind. Cl. Comm. at 355, n. 27. Chairman Kuykendall, on the other hand, who dissented in this aspect of the case, is of the opinion that "joint Indian title" can exist only where two or more tribes have become so closely allied or integrated in their land use and occupancy that they have in fact become virtually one land using entity. He does not believe that the concept is applicable to a situation where two separate entities, each possessing Indian title to its own lands, attempt to assert joint ownership to an area between their respective lands which is commonly used by both groups. 30 Ind. Cl. Comm. at 256–57. The Chairman's stated position is espoused by the Government here on appeal. There are no holdings of this court which say that two Indian tribes or groups, each a separate "entity" and each with its own separate lands, can never assert joint ownership to other lands which are commonly used and occupied. *Seminole Indians of Florida v. United States*, 197 Ct. Cl. 350 (1972), and *Iowa Tribes*, *supra*, do not stand for the proposition that two or more tribes claiming joint aboriginal title must invariably and indispensably show that they have become, for all purposes, a "single land-owning entity." In *Seminole Indians of*

Florida, *supra*, the issue of joint aboriginal title was not before the court. On the record before us in *Iowa Tribes*, *supra*, we held that the Iowas and the Sac and Fox may have used lands in common, but that the Commission could properly decide, on the basis of the evidence before it, that their occupancy was not proved to be truly joint, and therefore that each separate tribe's claims to Indian title would have to be tested on its own distinct basis. The *Iowa Tribes* decision did not purport to set down any rule that two or more tribes must first conclusively prove that they are a single or closely integrated entity before they can claim joint ownership of land. In our view, the Commission correctly held that the complete merger of two or more tribes into one is not a prerequisite for claiming joint aboriginal title.

There is ample evidence in the record before us to support the conclusion that the pueblo of Santo Domingo and the pueblo of San Filipe jointly used and occupied the disputed 8,600 acre tract for a long period of time.[8] We believe that the Commission could properly decide, on this record, that the two pueblos had "joint aboriginal title" at the time the lands were included in the San Filipe Executive Order Reservation. Both pueblos believed for a very long time that they owned the disputed area in joint tenancy under a 1770 land grant from the Spanish Crown. They asked the Court of Private Land Claims in 1898 to confirm that grant over the entire area in both of them jointly. By a narrow vote, the Court of Private Land Claims confirmed only the northern 1,100 acres, but that area is adjacent to the tract now in dispute and it formed an integral part of the larger tract which the Indians believed they owned in common. The factual picture which has emerged here adds up to significantly more than mere use and occupancy of a particular area by two or more tribes at the same time. These two pueblos had a joint Spanish grant which they believed to encompass a large area, and although the Court of Private Land Claims did not validate the entire claim, it did validate an area contiguous to the 8,600-acre tract in issue—hence there was

[8] The Government's attack upon the sufficiency of the Commission's findings is wholly lacking in merit.

a substantial objective basis for the Indians' belief that they jointly owned the disputed land.

Since the Commission's findings are supported by substantial evidence, and since its decision is free from errors of law, the interlocutory orders and determinations appealed from must be, and hereby are

Affirmed.

ANDREAS H. POSCHL v. THE UNITED STATES

[No. 369-73. Decided April 16, 1975]

ON PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

Civilian pay; dismissal; Canal Zone policeman; participation in Panamanian political activities.—Plaintiff, a citizen of Panama, asks the court to reinstate him in his former position as a Canal Zone policeman and to pay him back wages from the date of his removal. In June 1970 three Panama National Guard Officers escaped from a Panama jail after being incarcerated following an abortive coup against the Government of Panama, and fled into the Canal Zone requesting political asylum. The United States determined that it could not comply with the request of Panama for the return of the escapees because of its adherence to the United Nations Protocol on the Status of Refugees. The denial resulted in a serious strain on United States-Panama relations. The day before the escape, the wife of one of the escapees arrived at plaintiff's home. During questioning of plaintiff immediately after the escape by Canal Zone police officials, including the chief of the Police Division of the Canal Zone, plaintiff was counseled and advised that he had been derelict in his duty in failing to advise them of the impending escape. In August 1970 plaintiff was arrested by the National Guard of Panama and imprisoned by Panama on charges that he had engaged in active participation in plots aimed at overthrowing the government of Panama, using to this end, his status as a Canal Zone policeman and his residence and telephone in Balboa. While incarcerated, plaintiff was separated from his position as a Canal Zone policeman for having abandoned his employment, this action was rescinded, he was retroactively reinstated and placed in a leave-without-pay status. Plaintiff was released from imprisonment in December 1970. After several months' delay the Canal Zone was furnished by Panama with plaintiff's alleged conviction papers and thereafter plaintiff's attorney and Canal Zone officials engaged in negotiations leading to a possible resolution of the situation, but these were unsuccessful. In

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July 1971 plaintiff was notified of a proposal to remove him, the notice listing five charges with reasons. Charge 1 was failure to reveal information to his superiors as he was obligated to do of the planned escape. Plaintiff denied the charges, he was notified that the charges warranted his removal, and he was separated effective August 22, 1971. After his removal plaintiff was given a hearing before a hearing examiner who found only charge 1 supported by the evidence. The Governor of the Canal Zone, on the basis of the hearing examiner's findings and recommendations, agreed with the hearing examiner as to charge 1 but reversed the latter as to charge 5 (conviction of a crime), and concluded that either charge fully supported plaintiff's removal. The Civil Service Commission dismissed an appeal to it for lack of jurisdiction to hear an appeal from a nonveteran employee in the excepted service. This suit followed. Plaintiff contends that the Canal Zone did not comply with all procedural requirements in effecting his removal, i.e. that the Chief's counseling session was "discipline," that his removal was for the same offense for which he received "discipline" and thus his removal was invalid; he also argues that the adverse action decision is barred by reason of delay in giving him notice thereof. The court does not consider it necessary to review the Governor's findings and conclusions with relation to charge 5, since it *holds* that charge 1 was sufficient to sustain plaintiff's removal, absent a showing by plaintiff that the Governor's decision was either arbitrary or capricious or unsupported by substantial evidence. It is also *held* that the meeting with the Chief was a counseling session and not an admonishment or reprimand within the purview of pertinent provisions of the Panama Canal Personnel Manual; that there were no procedural errors; that under the circumstances, the delay in giving plaintiff notice was not unreasonable; and that plaintiff is not entitled to recover. Plaintiff's motion for summary judgment is denied, defendant's cross-motion is granted, and the petition is dismissed.

Civilian pay; administrative or executive decisions; review of by court.

[1] This court will not overturn an administrative factual determination unless it finds the decision arbitrary, capricious or unsupported by substantial evidence.

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Civilian pay; dismissal; notice, delay in giving; what constitutes.

[2] Under Canal Zone regulations disciplinary action against employees should be timely and taken promptly, but not so hasty as to preclude consideration of the facts or to limit such consultation or deliberation as the circumstances may warrant. Where (1) plaintiff, a Canal Zone policeman, assigned to liaison between Panama and the Canal Zone, in August 1970 was arrested and imprisoned by Panama on charges growing out of his alleged activities in connection with an escape from a Panama jail into the Canal Zone of Panama National Guard officers who had been imprisoned following

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an abortive coup against the Panamanian Government, (2) plaintiff was placed in a leave-without-pay status, (3) in December 1970 he notified the Canal Zone that he wished to continue employment alleging wrongful detainment by Panama, (4) after inquiries extending over several months the Canal Zone was furnished by Panama with plaintiff's alleged conviction papers, (5) thereafter negotiations between plaintiff's attorney and the Canal Zone leading to a possible resolution of the situation ensued but were unsuccessful, and (6) in July 1971 plaintiff was notified of a proposal to remove him on the basis of five charges with specifications, the delay in giving plaintiff notice of adverse action against him under the circumstances was reasonable.

United States ⇐ 36

Civilian pay; separation; abandonment of employment; intent.

[3] In order to establish abandonment of employment, there must be an intent to abandon.

Master and Servant ⇐ 29

Civilian pay; administrative remedies; failure to exhaust; generally.

[4] Where plaintiff sues in this court for back pay arising from an allegedly invalid adverse action, the court may decline to review his claim of procedural error not raised during the administrative proceedings.

Courts ⇐ 460

Civilian pay; Court of Claims jurisdiction; administrative or executive decisions; review of by court.

[5] Where an administrative agency has complied with the prescribed procedural requirements, the Court of Claims can only review the action to determine whether the officials who effected the dismissal acted arbitrarily, capriciously or were so grossly erroneous as to be in bad faith, as for instance where they may have acted without substantial evidence to support their decisions or where they exceeded their authority.

Administrative Law and Procedure ⇐ 791

Civilian pay; presumptions; official actions of Government officials; presumption of regularity.

[6] The presumption in this court's review of civilian pay cases is that the Government officials have acted in good faith; and the burden is on plaintiff of showing that the decision complained of was so lacking in rational support as to be characterized as arbitrary or capricious. The quality of proof necessary for plaintiff to overcome the presumption that an official acted in good faith is high.

United States ⇐ 39(13)

Civilian pay; dismissal; arbitrary and capricious action; what constitutes.

[7] Under the circumstances here, where, *inter alia*, plaintiff, a Canal Zone policeman, was serving as a liaison agent in which

Opinion of the Court

position he was required to maintain close liaison with the Panamanian National Guard and the Canal Zone National Department of Investigation in order to keep abreast of political events in Panama which could backfire into the Canal Zone, and where the record evidence shows that plaintiff admitted to his superior officers that he had foreknowledge of the escape of three Panama National Guard officers from a Panama jail into the Canal Zone which had embarrassing repercussions with respect to relations between Panama, the Canal Zone and the United States, there was substantial evidence to support plaintiff's removal under the charge of failure to reveal information of the planned escape to his superiors as he was obligated to do, and the administrative decision was neither arbitrary nor capricious.

United States ⇐ 36

Evidence; weight and sufficiency of evidence.

[8] Even if the plaintiff herein presented evidence to the agency which contradicted evidence presented by the agency, that situation would not render the agency's evidence unsubstantial. Exaggeration, inherent improbability, self-contradiction, omissions in a purportedly complete account, imprecision and errors may all breed disbelief and therefore the disregard of even uncontradicted non-opinion testimony.

United States ⇐ 39(13)
Evidence ⇐ 594

Samuel I. Sherwood, attorney of record, for plaintiff.

John W. Showalter, with whom was *Assistant Attorney General Carla A. Hills*, for defendant.

Before SKELTON, KASHIWA, and KUNZIG, *Judges*.

KASHIWA, *Judge*, delivered the opinion of the court:

Plaintiff in this action petitions this court to reinstate him in his former position as a policeman in the Canal Zone Government (hereinafter Canal Zone) and to pay him back wages from the date of his removal. After his removal, plaintiff appealed to the Governor of the Canal Zone. A hearing was held before a hearing examiner and a report made to the Governor. The Governor denied plaintiff's appeal. Plaintiff then appealed to the Civil Service Commission. The Commission dismissed plaintiff's appeal on the ground that it lacked jurisdiction to hear an appeal from a

non-veteran employee in the excepted service. Plaintiff filed suit in this court on October 2, 1973.

The case is before this court on cross motions for summary judgment. We hold for the defendant, allowing its cross motion for summary judgment and denying plaintiff's motion for summary judgment, for reasons hereinafter stated.

For a better understanding of this case, we refer to certain regulations relating to the Canal Zone concerning "Employee Responsibilities and Conduct" which are not ordinarily applicable to federal employees. Due to the length of the quoted portions, we reproduce the relevant portions below.[1]

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[1] "AUTHORITY: The provisions of this Part 255 issued under E.O. 11222 of May 8, 1965, 30 F.R. 6469, 3 CFR, 1965 Supp.; 5 CFR 735.104.

"Subpart A—General Provisions

"§ 255.735–1 *Purpose.*

* * * * *

"(b) The nature of the Canal enterprise, its geographical location, and the political status of the United States in the Canal Zone make it necessary to impose certain restrictions on personal conduct both on and off the job that are not ordinarily applicable to Federal employees. In particular, the officially declared interest and policy of the Government of the United States in strengthening the bonds of friendship with the Government and people of Panama, place a direct responsibility on each employee, for himself and his dependents, to refrain from any action or conduct that might in any manner obstruct accomplishment of this end or of any other declared national-policy objective of the United States concerning relations between the United States and Panama.

* * * * *

"Subpart B—Ethical and Other Conduct and Responsibilities of Employees

"§ 255.735–30 *Proscribed actions.*

"An employee shall avoid any action, whether or not specifically prohibited by the regulations in this part, which might result in, or create the appearance of:

* * * * *

"(f) Affecting adversely the confidence of the public in the integrity of the Government.

* * * * *

"§ 255.735–38 *General conduct prejudicial to the Government.*

"An employee shall not engage in criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, or other conduct prejudicial to the Government. For employees on the Isthmus, relations between the United States and Panama will be considered in determining whether conduct is prejudicial to the Government.

* * * * *

"§ 255.735–41 *Participation in Panamanian political activities.*

"In view of the geographical and other relationships between the Republic of Panama and the Canal Zone, the following policies are prescribed concerning participation by employees in Panamanian political activities:

"(a) Employees residing in the Canal Zone who are not Panamanian citizens shall not engage in any form of Panamanian political activity.

"(b) Employees who are Panamanian citizens may exercise political rights guaranteed to them by Panamania law. They may affiliate themselves with

Particular attention is called to the quoted portion of the "purpose" clause.

An unusual feature of this case is that plaintiff is a citizen of the Republic of Panama (hereinafter Panama). It appears that prior to 1964, with a few exceptions, only United States citizens were employed by the Canal Zone, but in 1964 this was changed permitting citizens of Panama to be employed. Plaintiff was one of the first to be hired after the change. He was hired on November 2, 1964. When the incidents hereinafter mentioned occurred, plaintiff was a trainee liaison agent under the Chief of Detectives in the Balboa District of the Canal Zone. The then Chief of Detectives testified before the hearing examiner that the duties of a liaison agent were as follows, Transcript (Tr.) at 11:

> Q. What are the duties of a liaison agent?
> A. A liaison agent has several duties. They investigate crime like the regular detectives do and they work more in the Republic of Panama than they do in the Canal Zone, that is, they check pawnshops and scrap yards for stolen property. They maintain close liaison with the National Guard and the DENI [National Department of Investigation] and are supposed to keep abreast of goings-on in the Republic of Panama, in the National Guard, in the DENI, and elsewhere, particularly political things that could backfire into the Canal Zone. They sometimes take fingerprints and, on occasion, process crime scenes.
> Q. When you say that gathering of information, particularly of a political nature, is one of their important duties?
> A. That is so, yes. At the time, it was keeping me abreast of what was going on in the Republic of Panama politically so that I could report it to my chief, and he, to the Security people.

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the political party of their choice. They may attend political meetings and be free to vote in all elections without jeopardizing their position with the Panama Canal agencies. However, no employee shall:

"(1) Engage in Panamanian political activity in or from within the Canal Zone;

"(2) Engage in Panamanian political activity during duty hours; or

"(3) Use his job or position with the Panama Canal agencies in the advancement of Panamanian political activity.

"(c) Any employee who may be appointed or elected to political office in the Republic of Panama shall be required to terminate his employment with the Panama Canal agencies."

Since we decide this case only under charge 1 of the five written charges [2] brought against plaintiff on July 12, 1971, by Edward A. Doolan, Personnel Director of the Canal Zone, we limit our preliminary factual statement to a summary of facts relevant to charge 1 only. We find that the best summary statement is the government's specification of charge 1 which immediately followed the five charges listed in footnote 2. Charge 1 addressed to plaintiff was specified as follows:

> 1. *Failure to reveal information to your superiors that you knew (or, in view of your position as a Canal Zone police private acting as a liaison agent, you should have known) you were obligated to disclose to them.* Three high-ranking officers of the Panama National Guard, Colonel Amado Sanjur, Colonel Ramiro Silvera, and Lieutenant Colonel Nenzen Franco, were prisoners in the Carcel Modelo in Panama City in June 1970, having been incarcerated there after an abortive coup believed to have been led by them the previous December against the Government of Panama. In the early morning hours of June 8, 1970, the three officers escaped and fled into the Canal Zone, where they requested political asylum. The Government of Panama demanded the return of the escapees. The United States Government determined that it could not deliver the fugitives because of its adherence to the United Nations Protocol on the Status of Refugees. The U.S. denial of extradition was communicated to Panama on June 24. The foregoing series of events resulted in a serious strain on U.S.-Panama relations.
>
> At about 7:20 a.m. on June 8, 1970, under questioning by Lieutenant Charles Smith, chief of detectives, at the

[2] "This is to notify you that it is proposed to remove you from your position as police private in the Police Division of the Canal Zone Government not earlier than 31 calendar days after the date you receive this letter. The reasons for this proposed action against you are as follows:

"1. Failure to reveal information to your superiors that you knew (or, in view of your position as a Canal Zone police private acting as a liaison agent, you should have known) you were obligated to disclose to them.

"2. Engaging in prohibited Panamanian political activities.

"3. Conduct prejudicial to the Government.

"4. Acts that could reasonably be expected to affect adversely the confidence of the public in the integrity of the Government.

"5. Conviction of a crime.

"Any one of the foregoing reasons is considered sufficient grounds for your removal. My proposed action, therefore, is not based upon an accumulation of two or more of those reasons."

Balboa police station, you admitted to Lt. Smith that you had prior knowledge of the planned escape of the three colonels for about a week, but did not report or discuss it with your superiors in the Police Division. You also admitted that the wife of Colonel Sanjur was then living in your home at 720–C Barnebey Street, Balboa.

At about 8:30 a.m. that same morning, Police Sergeant Richard Kinsey accompanied you to your residence where Mrs. Sanjur signed a political refugee form. Mrs. Sanjur told Sgt. Kinsey that she had come from Panama into the Canal Zone in the early evening hours of June 7 to begin her stay at your quarters in anticipation of the escape of her husband. You were evasive in your answers to Sergeant Kinsey concerning details of the escape plan. Mrs. Sanjur remarked that she was sorry they were unable to free Colonel Bernal, who was jailed on a different floor of the Carcel Modelo, but she said it would have ruined the plan to try to get him out too.

Still later on the morning of June 8, you were interviewed by Captain H. C. Richards, district police commander, in the presence of Sgt. Kinsey. You were evasive and gave contradictory answers when Captain Richards questioned you to determine the extent of your involvement in the escape. For example, at one point you stated that an attaché case containing the Sanjur papers had been delivered to your residence about a week earlier by Mrs. Sanjur's nephew. Later you stated that Mrs. Sanjur had brought the case to the house. Shortly after the interview with Captain Richards, you informed Sgt. Kinsey that you had not mentioned the jailbreak plan to any of your superiors in the Police Division because it would have meant that written reports would have been forwarded, and too many outsiders would then have had knowledge of the proposed escape.

On June 12, 1970, at about 1:00 p.m., you were again questioned by Lt. Smith concerning your knowledge of the escape of the colonels, and you admitted to him that you had known of the planned escape for "about four or five days" prior to the escape.

At the time of the events described above, in early June, 1970, as at times previous thereto, you were performing the duties of liaison agent for the office of the chief of detectives at Balboa. One of the important duties of all Canal Zone police officers is to furnish information to their superiors on matters within their knowledge that bears on law enforcement and the maintenance of peace and order in the Canal Zone. In addition, one of

> the most important duties of a liaison agent is to acquaint himself with and report on matters concerning the Republic of Panama that are of interest to law enforcement officials in Panama and the Canal Zone. Your advance knowledge of plans for the imprisoned National Guard Colonels to break out of the Carcel Modelo and flee into the Canal Zone was intelligence of vital interest and importance to your superiors. So, also, was your knowledge that Mrs. Sanjur had come from Panama into the Canal Zone to seek refuge, and especially since her reason was to await the imminently expected escape of her husband from custody.

Certain events after June 12, 1970, hereinafter related, are relevant to procedural questions raised by plaintiff. On June 18, 1970, plaintiff met with Gaddis Wall, Chief, Police Division, Canal Zone, and with Captain Richards. At the meeting, plaintiff was counseled and advised that he had been derelict in his duty by failing to advise the Canal Zone Police of the impending escape of Colonel Sanjur. The counseling was not regarded as an official disciplinary act by Chief Wall.

On June 20, 1970, plaintiff accompanied Mrs. Sanjur on the sailing to Miami. After arriving at Port Everglades on June 23, 1970, plaintiff returned by airplane to the Canal Zone on June 24, 1970. Plaintiff then went on vacation with his family for a period of one week.

On August 25, 1970, plaintiff was arrested by the National Guard of Panama. The charges against plaintiff were stated to be "active participation in plots aimed at overthrowing the present Government of the Republic of Panama, using to this end, his [plaintiff's] status as a Canal Zone Policeman and his residence and telephone in Balboa."

On August 27, 1970, Edward A. Doolan, Personnel Director of the Canal Zone, sent plaintiff a letter informing him of a proposal to remove him from his position. On September 10, 1970, Mr. Doolan sent plaintiff a letter rescinding his letter of August 27, 1970. Mr. Doolan stated his reason for taking this action: "because it does not appear that you can personally respond to the charges or appear at a hearing to present your case." Mr. Doolan stated that published re-

ports indicated plaintiff had been sentenced to a term of imprisonment. Mr. Doolan's letter went on to state that plaintiff had been separated for having abandoned his employment with the Canal Zone.

On September 17, 1970, Resolution Number 17 was issued condemning Oscar Taitt, Andreas Poschl H., and Alfredo Atericio Aparicio to the term of two years in jail. During the middle of October, plaintiff was transferred to the penal colony on the Island of Coiba. Plaintiff was released from the penal colony on December 14, 1970.

On July 12, 1971, Mr. Doolan sent a letter to plaintiff rescinding the previous letter of September 10, 1970. Plaintiff was retroactively reinstated as a police private effective August 25, 1970. He was placed in a leave-without-pay status from August 25, 1970, through December 16, 1970. Regular compensation was to be paid effective December 17, 1970. On July 12, 1971, Mr. Doolan sent a letter to plaintiff notifying him of a proposal to remove him from his position as a police private. The reasons for the proposed action were the five charges listed in footnote 2. In addition, Mr. Doolan notified plaintiff that he was placed in a non-duty pay status for a period not to exceed five days in order to effect plaintiff's suspension for 30 days or less. On July 13, 1971, plaintiff was notified that effective 24 hours after receipt, he was suspended from duty without pay for 30 days during the notice period of the proposed removal. Mr. Doolan stated that the retention of plaintiff in an active duty status would be detrimental to the interests of the government. Plaintiff responded to Mr. Doolan's letter of July 12, 1971, on July 21, 1971, and denied the charges.

On August 11, 1971, Daniel J. Paolucci, Acting Personnel Director, Canal Zone, sent a letter to plaintiff informing him that the charges in the letter of July 12 warranted plaintiff's removal. The effective date of the removal was August 12, 1971.

On August 25, 1971, plaintiff appealed his removal by letter to the Governor of the Canal Zone, David S. Parker.

Plaintiff was allowed to choose a hearing examiner for his appeal and did so by letter, choosing one Roger Toledano.

The hearing was held on October 27, 28 and 29, 1971, before said hearing examiner, Roger Toledano. A complete, 285-page transcript of the proceedings before the hearing examiner, together with documentary evidence presented, constitutes a major portion of the record presented to this court in this case. The hearing examiner submitted his findings and recommendations to the Governor on January 24, 1972, and found only charge 1 supported by the evidence. All remaining four charges, he found unsubstantiated. In pertinent part in his Recommendations, this is what the hearing examiner decided:

> * * * appellant did, in effect, fail to reveal information * * * as would be required * * *. I, therefore, concur with the Personnel Director's letter of decision in respect to the 1st charge. The other charges set forth did not have enough substantial evidence to back them up. Since any one of the charges is of sufficient gravity to require removal of the appellant, I would then have to concur with the removal decision. * * *

However, the hearing examiner was partially overruled by the Canal Zone Governor and by a decision dated May 5, 1972, the said Governor, David S. Parker, found

> * * * the first and fifth reasons for your discharge, or either of them, fully support your removal as promoting the efficiency of the service. * * *

In other words, the Governor agreed with the hearing examiner that charges 2, 3 and 4 were not substantiated, whereas charge 1 was substantiated. But the Governor reversed the hearing examiner on charge 5 and found that it was substantiated and supported removal. The Governor concluded that the two charges, 1 and 5, were supported and that either of them fully supported plaintiff's removal.

Plaintiff then appealed to the Civil Service Commission on May 11, 1972. On June 6, 1972, the Appeals Examining Officer denied plaintiff's request to appeal on the ground that the Commission lacked jurisdiction since plaintiff was neither employed in the competitive service nor was a preference eligible employee in the excepted service. Plaintiff appealed to the Board of Appeals and Review. The BAR affirmed the

decision of the Appeals Examining Office. Plaintiff does not now contest the decision of the Civil Service Commission denying jurisdiction.

Plaintiff filed suit in this court on October 2, 1973.

We have examined the record established before the hearing examiner and after hearing argument of counsel, it is our opinion that the Governor properly sustained charge 1 and that the Governor also properly found that charge 1 only was sufficient to support plaintiff's removal. We, therefore, do not find it necessary to review the Governor's findings and conclusions with relation to charge 5, the conviction of crime charge. Most of the able argument by counsel in the briefs and by way of oral argument in this court related to the validity of plaintiff's conviction under Resolution 17, an alleged judgment of a Panama court. Since we have chosen to uphold plaintiff's removal under charge 1 only, we do not find it necessary to express our views regarding the validity of Resolution 17.

Plaintiff first complains that the Canal Zone did not comply with all procedural requirements in effecting plaintiff's removal. His first specific ground is that the counseling session given him by Chief Wall on June 18, 1970, was "discipline." Plaintiff then argues that his removal was for the same offense for which he received "discipline" and, therefore, his removal is invalid. Essentially, plaintiff is arguing that if an employee is disciplined for offense X, then the agency is barred from taking adverse action against the employee on the basis of offense X.

The first problem with plaintiff's argument is that Chief Wall's counseling of plaintiff was not a disciplinary act. Furthermore, the case cited by plaintiff does not hold, as plaintiff argues.

First, then, we must consider the problem of whether the counseling session with Chief Wall can be considered a disciplinary act. Plaintiff argues the counseling session was an admonishment or a reprimand. The record is clear that it was not a reprimand. No reprimand was given in writing to plaintiff and nothing was placed in his official personnel folder as is required by Panama Canal Personnel Manual

(PCPM) § 751, Subchapter 2, 2–5(2).[3] It seems also clear that the counseling session was not an oral admonishment as defined by PCPM § 751, Subchapter 2, 2–5(1).[4] In the first place, Chief Wall was not plaintiff's "immediate supervisor." Captain Richards, as District Police Commander in Balboa District, would have been the supervisor ordinarily required to administer such an admonishment. In the second place, Chief Wall in his testimony continually referred to the session as "counseling" and not as either a reprimand or admonishment. Finally, Governor Parker in his decision of May 5, 1972, specifically held that the counseling session was not a displinary action as defined by PCPM § 751 or 752, but was merely a counseling session. This court may, therefore, not overturn such a factual determination unless it finds the decision arbitrary, capricious, or unsupported by substantial evidence. *Grover* v. *United States*, 200 Ct. Cl. 337, 343 (1973). Consequently, we find that the June 18, 1970, meeting with plaintiff and Chief Wall was a counseling session and not an admonishment or reprimand.

We do not find anything in *Jacobowitz* v. *United States*, 191 Ct. Cl. 444, 458–459, 424 F. 2d 555, 563 (1970), which is in favor of the plaintiff:

> This only leaves Charge I relative to the late cashing of taxpayers' checks by plaintiff as stated in the two specifications of this Charge. It is our view that Charge

[3] "§ 751 SUBCHAPTER 2—*Disciplinary Practices*

* * * * *

"2–5 *Effecting the Action.*

* * * * *

"(2) *Written reprimand.* Supervisors shall have the authority to issue written reprimands to their subordinate employees. The employee shall be given an opportunity to explain his conduct, at least informally, before the decision is made to issue the letter of reprimand. The letter shall state in detail the reasons for its issuance, and it shall inform the employee of his right to appeal under the agency's grievance procedure within fifteen (15) calendar days after the reprimand is received by him. A copy of the reprimand shall be placed in the employee's official personnel folder."

[4] "(1) *Oral admonishment.* The most informal means by which an employee's attention is called to deficiencies in his conduct or work performance is that of oral admonishment. This action shall ordinarily be taken by the immediate supervisor. No record of such admonishment shall be placed in the employee's official personnel folder, but should be kept in the unit's files. Oral admonishments are not applicable under agency grievances or adverse action procedures. When necessary and appropriate to describe a pattern of conduct or performance, reference to past incidents for which an employee has been orally admonished may be included in specifications of proposed disciplinary action or performance rating warnings."

> I and Charge II are so intertwined and braided together, with Charge II being the principal complaint against plaintiff, that when Charge II is held to be invalid, Charge I must suffer the same fate. As a matter of fact, counsel for the government tacitly agreed at oral argument before us that the plaintiff would not have been discharged under Charge I had it not been for Charge II. In any event, we agree with plaintiff that his discharge on Charge I after 22 years of satisfactory government service was too harsh and out of all proportion to the offense charged. We have held that a dismissal under such circumstances is an abuse of discretion, is illegal, and demands redress by this court. [Citations omitted.] This charge was minor in nature, was old, and plaintiff had already received a reprimand for it from his superior. His dismissal based on this charge was too harsh and an abuse of discretion by the agency under all of the circumstances and will not be allowed to stand.

It is clear that this court refused to uphold the removal on the basis that it was too "harsh and an abuse of discretion." The court did not hold that a previous reprimand for an offense barred using that offense as a basis for removal. In fact, by resting its holding on the abuse of discretion, the court assumes that a previous reprimand does not bar using an offense as a charge for removal.

Plaintiff next makes the argument that the adverse action decision is barred by reason of a delay in giving plaintiff notice of the adverse action.

The controlling regulation governing the timeliness of agency action is PCPM § 751, Subchapter 2, 2–2:

> To be most effective, discipline shall be timely and prompt at every step in the procedure, but not so hasty as to preclude consideration of the facts or to limit such consultation or deliberation as the circumstances may warrant.

A case involving a similar regulation has previously been decided by this court. *Cook* v. *United States*, 164 Ct. Cl. 438 (1964). In *Cook* the plaintiff committed the crime of theft on January 18, 1961; he was charged on February 9, 1961; he pleaded guilty and was fined on February 15, 1961; the advance notice of proposed removal was issued March 27, 1961. This court in *Cook* stressed the reasonableness of the

agency's waiting "until it was finally determined by a court that plaintiff was guilty." *Cook* v. *United States*, *supra*, at 444. Following final court action, there followed:

> * * * submission of a report by plaintiff's immediate supervisor, endorsement by the department head, an interview accorded plaintiff with his immediate supervisor, an interview with the person whose property was taken by plaintiff, and a report from the leading man to the department head. This all took some time, but we cannot say that there was unreasonable delay in processing plaintiff's removal. Accordingly, we hold that Regulation NCPI 750 2–3b was clearly complied with.

An examination of the facts in the present case also shows that here, too, there was no unreasonable delay. On August 25, 1970, plaintiff simply disappeared from his job. The first reaction of the Canal Zone, admittedly an erroneous one, was to propose to remove plaintiff on August 27, 1970. The reason for this action is easy to see. Plaintiff was not only a police officer of the Canal Zone but one assigned to liaison between Panama and the Canal Zone. His involvement caused extreme embarrassment to United States-Panamanian relations. The Government of Panama in a letter dated August 28, 1970, by its Minister of Foreign Relations, addressed to His Excellency Herbert Thompson, Chargé d'Affaires, a.i. of the United States of America, Panama, Republic of Panama, expressed its views as follows:

> It is my duty to inform Your Excellency that the National Guard has arrested Mr. Andreas POCHL [sic] HUEMER, Panamanian, 33 years of age, Canal Zone Policeman, with residence at 770 C, Balboa, Panama Canal Zone, who is accused, based on authentic evidence, of active participation in plots aimed at overthrowing the present government of the Republic of Panama, using to this end, his status as a Canal Zone Policeman and his residence and telephone in Balboa.
>
> Policeman Andreas POSHL [sic] HUEMER received instructions from former National Guard Colonel Amado SANJUR ATENCIO, from Miami, to prepare, together with Mr. Augusto Gregorio ATENCIO, subversive plans against the Panamanian Government. Likewise, Mr. POSHL [sic] HUEMER has a duly verified record of using Panama Canal Zone territory as a

sanctuary for elements preparing subversive plots against the Republic of Panama.

I wish to request Your Excellency to forward the above information both to the Department of State and to the Canal Zone authorities, as the government of Panama finds it is intolerable that the part of its territory pertaining to the Canal Zone be used to promote subversive plans against the Panamanian institutions themselves.

Likewise, given the friendly relations existing between our two Governments, the freedom of action enjoyed by former Colonel Amado SANJUR ATENCIO in the United States of America to promote from there subversive acts against the Republic of Panama puzzles the Panamanian Government.

I take the opportunity to reiterate to your Excellency the assurances of my highest and most distinguished consideration.

The Canal Zone very quickly realized, however, that since plaintiff could not respond to adverse action charges, it would not be fair so to proceed. Instead, the Canal Zone separated plaintiff for abandoning his employment. The guidelines for abandonment actions are set out in FPM § 751, Subchapter 2, 2–1.[5] The agency is first required to ascertain

[5] "§ 751 SUBCHAPTER 2—*Specific Disciplinary Situations*
"2–1 *Absence Without Leave.*

* * * * *

"b. *Prolonged absence and failure to return from leave or furlough.* (1) When an employee fails to report for duty, or to return from leave or furlough, and fails to inform his agency what he intends to do, the agency should attempt to determine his intentions. If he replies that he has quit, the separation should be processed as a resignation. If he requests additional time, consideration should be given to a grant of leave. When an employee absents himself without approved leave but indicates his intent to return to duty, the agency may institute separation or other appropriate disciplinary action.

"(2) When, after a reasonable time (10 calendar days or more), the agency has been unable to ascertain the employee's intention concerning his return to duty, it has the option of processing his separation as an abandonment of position or as an adverse action for absence without leave.

"(a) If the agency attempts to process the separation as an adverse action, it is sometimes faced with the problem of serving notice on the employee, and there is also the possibility that the employee may return to duty before the separation action is consummated.

"(b) An employee may be separated for abandonment of position without following the job protection procedures in chapter 752. A nontemporary employee, however, who asks to be restored to duty after being separated in this way should be restored unless the agency has proof that he actually abandoned his position; otherwise, the Commission may find upon appeal that he did not abandon his position and order him to be restored. Any dis-

(Continued)

the intention of the employee as to whether he will return. Of course, in this case, the agency could not do this since plaintiff could not be contacted. The FPM next states that after a reasonable time (10 days or more), if the agency still cannot contact plaintiff, it may either process his separation as an abandonment or as an adverse action for absence without leave. The FPM notes, however, (FPM § 751, Subchapter 2, 2–1(b)(2)(a)), that the adverse action proceeding is frowned upon because of the difficulty of giving notice. In fact, the Canal Zone did take the better route and treated plaintiff's absence as an abandonment. Such a proceeding does not require the job protection procedures of FPM § 752. FPM § 751, Subchapter 2, 2–1(b)(2)(b).

From August 25, 1970, until December 16, 1970, the Canal Zone could not receive any communications from plaintiff since he was in prison. On December 16, 1970, plaintiff appeared and by letter notified the Canal Zone that he wished to continue his employment. He alleged that he had been "wrongfully detained" by Panama. The question for the agency, then, was whether plaintiff was guilty. As this court in *Cook* stressed, it was reasonable for the agency to wait "until it was finally determined by a court that plaintiff was guilty." *Cook* v. *United States*, *supra*, at 444.

In Panama a record of conviction is kept by the National Department of Investigation, referred to as the DENI. The Canal Zone could request such records and they would be furnished by the head of the DENI. In the plaintiff's case, inquiries had been made to ascertain whether he had been convicted. Mr. Cazorla, police detective of the Canal Zone, had made inquiries to various courts to determine if plaintiff had been convicted and sentenced. The record shows that the Canal Zone police were not given full cooperation by Panama. Even the night judge who signed Resolution 17 was hesitant to turn it over. Mr. Cazorla testified that the change in government made it different. Finally, after some months,

(Continued)
ciplinary action that may appear to be warranted can be taken after the employee is restored to duty.

"(3) Separations for absence without leave are processed in the same manner as other adverse actions. Separations for abandonment of position are processed as Separation—Abandoned Position, in the manner prescribed in chapter 715. * * *"

an official record was given to the Canal Zone on April 23, 1971, showing plaintiff's alleged conviction.[6] Thus, it was only on April 23, 1971, that the agency was able to obtain the alleged conviction papers relating to plaintiff. Thus, the delay until April 23, 1971, we hold, as in *Cook*, to be reason-

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[6] Plaintiff was represented before the hearing examiner by attorney Harry H. Allen, Jr. In his opening statement before the examiner, he stated as follows concerning the confused state of affairs in Panama regarding the alleged conviction records of plaintiff, Tr. at 4–5:

"* * * Mr. Poschl, responding to a request of an old-time friend to come over and have a drink or come over and see him—the old-time friend being the man in charge of the Carcel Modelo and a member of the National Guard—he went over to see him, which is not out of the ordinary for him. He was arrested and put incommunicado in the Carcel Modelo. That was on August 25, I believe. Two days later, the National Guard published and released to the local papers a story that he had been convicted of subversive activities against the actual government of Panama, to use their words, and had been given two years in Coiba. Remember that date is August . . . (checking his files) the date is August 28, 1970. The Government now charges here that he was convicted on September 22, almost a month later. And they have produced, and we have the documents here, and I have no doubt that they were put before the Hearing Examiner today, papers from DENI which is the Investigation Department of the Panama Government showing that he was convicted on September 22. But, on the other hand, we have been furnished what purports to be a judgment of the Night Court in Panama showing that the man was convicted on September 17, a difference of five days. We will also show, I believe, thru expert witnesses, that the Night Court in Panama was without jurisdiction in this type of a matter. And we will show also that Mr. Poschl was at no time tried or faced his accusers in the Night Court or in any court, and that he was not tried, he was not found guilty. And all of these papers that are before you today, showing this conviction, are as phony as a three-dollar bill. He was never before the court and he was, in fact, in his cell and late one evening he was told to go down, taken down to an office downstairs where Beleno who is the Night Court Judge, said, "Sign the papers. I have orders. This is it. You sign them, and that's it." He signed; he had been endorsed by office some time there. Shortly after this he was taken up to Coiba under a sentence of two years at the prison island. To go further than this, all of a sudden . . . and to show how phony this operation was, how unreal and how illegal, and how much it was against even the Panama law, when a man is convicted in the courts of Panama and sentenced to serve a time in jail, this conviction is reported to a Department of Correction under the Department of the Minister of Government and Justice. It is that department that determines where the man will serve the sentence; not like in the Canal Zone—we only have one penitentiary with regard to Panamanians and the Panamanians are sent there as a matter of course and as a matter of law. But the Department of Correction in Panama can determine whether a man should serve the sentence in the common jail, in Capira, in Bejuco, Chame, or any place that they want. This record is not in that office and never was there and is not there today.

"We will show also by documents that months after his so-called conviction in Panama the office of DENI, the proper office who keeps track of all records of convictions of people found guilty of crimes, stated that there had been no conviction of Mr. Poschl and that his record was completely clean and there was nothing against him. And we have two of these, all of which have been furnished to the Government, and we have that before them."

able under all the strange and unusual circumstances in this case.

On May 3, 1971, a few working days after the discovery of the papers showing the alleged conviction, the Canal Zone called Harry Allen, plaintiff's attorney, to discuss a possible negotiated solution to the situation. During May and June, negotiations continued between the Canal Zone and Mr. Allen. Clearly, just as in *Cook*, various procedures were taken after discovery of the conviction to determine the best course of action. Plaintiff can hardly object to such procedures since his counsel participated in them.

Unfortunately, the negotiations between the parties were unsuccessful. The question then became, again, what should the agency do? The agency had already separated plaintiff for abandonment. Plaintiff had requested restoration. On the other hand, the Canal Zone had several charges for which they could proceed by way of an adverse action for plaintiff's removal. It is stated in FPM § 751, Subchapter 2, 2–1(b)(2)(b) that:

> An employee may be separated for abandonment of position without following the job protection procedures in chapter 752. A nontemporary employee, however, who asks to be restored to duty after being separated in this way should be restored unless the agency has proof that he actually abandoned his position; otherwise, the Commission may find upon appeal that he did not abandon his position and order him to be restored. Any disciplinary action that may appear to be warranted can be taken after the employee is restored to duty.

In order to establish abandonment, there must be an intent to abandon. *Grove Laboratories, Inc.* v. *Brewer & Co.*, 103 F. 2d 175, 185 (1st Cir. 1939). Given the fact that plaintiff's absence was caused by his arrest and physical confinement, the Canal Zone justifiably doubted their ability to prove intent to abandon. Instead, following the recommended FPM procedure, the Canal Zone restored plaintiff to duty. In addition, the Canal Zone gave plaintiff full pay for the period December 16, 1970, to July 12, 1971. Thereafter, following FPM recommended procedures, the Canal Zone instituted adverse action procedures against plaintiff.

In summary, there has been no unreasonable delay in this case. Defendant has shown that during the period August 25, 1970, to December 16, 1970, the plaintiff was unavailable to the Canal Zone. After plaintiff's release, the Canal Zone sought information concerning plaintiff's alleged conviction; the documents of the alleged conviction were found on April 23, 1971. Needless to say, such a long delay may seem improbable under our court systems where conviction records are easily obtained from court records. The situation related in footnote 6 by plaintiff's own attorney showed the complexity of the situation. It appears that there were reasons to withhold the Resolution by those who issued it. We need not go into the merits of the judgment but it was obtained under questionable and unusual circumstances, and there was reason to delay its public exposure. During May and June, 1971, negotiations were conducted with plaintiff's attorney, seeking some sort of solution. Finally, negotiations having broken down, plaintiff was restored to duty on July 12, 1971, and adverse action taken on July 13, 1971. As was said in *Cook* by this court: "This all took some time, but we cannot say that there was unreasonable delay in processing plaintiff's removal." *Cook* v. *United States*, *supra*, at 444.

Plaintiff alleges that there was an error in procedure regarding "30-day suspension without pay on charges, without right to reply." It was raised for the first time before this court. Neither the hearing examiner nor the Governor were given notice of such errors. We decline to review such alleged error. *Grover* v. *United States*, *supra*, at 345.

We, therefore, hold that with relation to charge 1 there were no procedural errors.

Since there were no procedural errors, we are in a situation well stated in *Morelli* v. *United States*, 177 Ct. Cl. 848, 858 (1966):

> * * * Where an administrative agency has complied with the prescribed procedural requirements, the Court of Claims can only review the action to determine whether the officials who effected the dismissal acted arbitrarily, capriciously or were so grossly erroneous as to be in bad faith, as for instance where they may

> have acted without substantial evidence to support their decision or where they exceeded their authority. * * *

Many other decisions of this court have also used the standard of review enunciated in *Morelli. Grover* v. *United States*, *supra*, at 343; *Holman* v. *United States*, 181 Ct. Cl. 1, 8, 383 F. 2d 411, 415 (1967); *Love* v. *United States*, 119 Ct. Cl. 486, 493–494, 98 F. Supp. 770, 774, *cert. denied*, 342 U.S. 866 (1951).

The presumption in this court's review of all civilian pay cases is that the Government officials have acted in good faith. *Travis* v. *United States*, 199 Ct. Cl. 67 (1972); *Holman* v. *United States*, *supra; Morelli* v. *United States*, *supra; Greenway* v. *United States*, 175 Ct. Cl. 350, 362, *cert. denied*, 385 U.S. 881 (1966). This court has clearly stated the burden plaintiff bears in order to counter such a presumption in *Travis* v. *United States*, *supra*, at page 70:

> There is a strong presumption that public officials act in good faith and the court will only look behind an administrative determination such as the one herein involved if the plaintiff meets the difficult burden of showing that the decision was so lacking in rational support as to be characterized as arbitrary or capricious. *Horne* v. *United States*, 190 Ct. Cl. 145, 150, 419 F. 2d 416 (1969). * * *

The quality of proof necessary for plaintiff to overcome the presumption that an official acted in good faith is high. In *Knotts* v. *United States*, 128 Ct. Cl. 489, 492, 121 F. Supp. 630, 631 (1954), this court said that "* * * we start out with the presumption that the official acted in good faith. We are always loath to find to the contrary, and it takes, and should take, well-nigh irrefragable proof to induce us to do so." *Accord*, *Grover* v. *United States*, *supra*, at 344.

We agree with defendant that plaintiff has plainly failed to make any showing that the decision by the Governor of the Canal Zone sustaining plaintiff's removal under charge 1 is either arbitrary or capricious or unsupported by substantial evidence. During the period in June shortly before the jailbreak of the colonels, plaintiff was serving as a liaison agent. Plaintiff had served in this capacity previously for varying periods of time. The duties of a liaison agent included inves-

tigation of crime and gathering of information. One of the most important duties of a liaison agent was to maintain close liaison with the Panamanian National Guard and the DENI in order to keep abreast of events in Panama, particularly political events which could backfire into the Canal Zone.

The escape of the colonels from the Carcel Modelo was an event of far-reaching concern for Panama, the Canal Zone, and the United States Government. The escape of the colonels was widely reported in the press. Immediately following the escape, a lengthy and increasingly explosive correspondence occurred between Panama and the Government of the United States. Plaintiff's foreknowledge of the escape of the colonels was exactly the sort of politically sensitive information which plaintiff was required to report to his superiors.

Captain Charles Smith, the District Commander in Cristobal, testified that on June 8, 1970, plaintiff told him that plaintiff had foreknowledge of the colonels' escape and had this knowledge for about a week. Captain Smith further testified that plaintiff's reason for not informing his superiors of the planned escape was that he feared for the safety of Colonel Sanjur.

Sergeant Richard H. Kinsey, assigned to the Balboa District, testified that on June 8, 1970, plaintiff told him that plaintiff had foreknowledge of the escape but did not want to mention it to anyone because of fear that a leak to anyone would ruin the whole escape plan. Sergeant Kinsey testified further that at a subsequent meeting with plaintiff, Sergeant Kinsey, and Captain Richards, the plaintiff again stated that he had foreknowledge of the escape but did not want to mention it to too many people because of the hazard of the escape plan being aborted. Captain Richards stated: "Do you mean you didn't feel it safe even to tell your superior officers?" Plaintiff's reply was that he had not wanted to discuss the escape plan with anyone. Still later in the day, Sergeant Kinsey stated to plaintiff that plaintiff should have realized how wrong he was for not informing superiors of the escape. Plaintiff responded, "Well, you know how it is, Sergeant, if you tell something like this, right away they

want memorandum [sic] and a memorandum can get out of hand. A lot of people get to read it."

Sergeant Andrew M. Wright, Jr., Detective, testified that on June 9, 1970, he was requested to monitor an interview between Captain Smith and plaintiff. Plaintiff told Captain Smith that he had knowledge of the escape plan four or five days before it was executed and that he really wanted to tell Captain Smith but was afraid of a security leak.

In response to this overwhelming testimony, plaintiff himself testified that he had heard rumors concerning the colonels but had dismissed them as gossip. Clearly, plaintiff admitted knowledge to his superior officers and his self-serving characterization of such knowledge as "gossip" does not minimize the admission to his superiors.

In addition to the direct testimony, much circumstantial evidence indicates plaintiff knew of the escape plans. To begin with, plaintiff himself admitted that he had known, and was close to, both Colonel Sanjur and his wife for a number of years.

Next, Captain Smith testified that plaintiff told him a brief case was delivered to plaintiff's home four or five days prior to the escape and that plaintiff told him that the brief case was one of the reasons he knew about the escape. Sergeant Kinsey testified that plaintiff told Captain Richards that the brief case was delivered by Colonel Sanjur's nephew about a week before the escape. Sergeant Kinsey testified that plaintiff had made a conflicting statement that Mrs. Sanjur had brought the brief case with her. Captain Richards remarked, "Doesn't it seem odd that we've got two conflicting statements here so close together." Sergeant Wright testified that at the June 9 meeting, plaintiff had stated that the brief case was brought to his home four or five days before the escape. The brief case contained the passports, visas, and personal papers of Colonel Sanjur and his wife. Mrs. Sanjur swore that the brief case was delivered prior to June 8.

Plaintiff admitted that the brief case was delivered to his home some days before the escape on June 8.

Finally, Captain Smith testified that plaintiff told him Mrs. Sanjur had arrived at his home on June 7. Plaintiff first notified Captain Smith that Mrs. Sanjur had taken

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refuge on June 8. Sergeant Kinsey testified that plaintiff stated Mrs. Sanjur had been at his house all night the night of June 7.

There is some conflicting testimony by Mrs. Sanjur, plaintiff and Mrs. Arango that Mrs. Sanjur did not arrive until around 6:00 or 7:00 a.m. at plaintiff's house. Nevertheless, even if plaintiff presented evidence to the agency which contradicted evidence presented by the agency, that situation would not render the agency's evidence unsubstantial. "Exaggeration, inherent improbability, self-contradiction, omissions in a purportedly complete account, imprecision and errors may all breed disbelief and therefore the disregard of even uncontradicted nonopinion testimony." *Sternberger* v. *United States*, 185 Ct. Cl. 528, 536, 401 F. 2d 1012, 1016 (1968).

In summary, then, we find that Governor Parker had substantial evidence to support plaintiff's removal under charge 1 and the Governor's decision was neither arbitrary nor capricious. See *Grover* v. *United States*, *supra*, and *Holman* v. *United States*, *supra*.

CONCLUSION

We, therefore, conclude and adjudge that plaintiff's petition be and is hereby dismissed. For the reasons above stated, we deny plaintiff's motion for summary judgment and allow defendant's cross motion for summary judgment.

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514 F. 2d 1027

ESTATE OF SAMUEL E. BOGLEY, LEONARD S. MELROD AND WARREN BROWNING, CO-ADMINISTRATORS v. THE UNITED STATES

[No. 52-73. Decided April 16, 1975]

ON DEFENDANT'S AND PLAINTIFF'S MOTIONS FOR SUMMARY JUDGMENT

Taxes; estate tax; gross estate, exclusions and inclusions; transfers taking effect at death.—The estate of Samuel E. Bogley seeks to recover federal estate taxes, plus statutory interest, assessed and collected from the estate. From 1955 until his death on January 8,

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1967 decedent was an officer, employee and director in each of three corporations (for convenience: BHM&L, Virginia and Prince Georges), and owned varying percentages of the common stock of said corporations. In 1955 BHM&L passed a resolution and Virginia adopted a motion providing that upon the death of any of the named officers (including decedent) the respective corporation was authorized to pay his estate or named beneficiary the total compensation received by the officer for the past 2 years prior to his death, the payment to be made monthly over a 2-year period following the officer's death. On November 10, 1958 Prince Georges passed a resolution providing that upon the death of any of the named officers (including decedent) the surviving widow or estate was to receive 2 years' salary based on the amount being paid at time of death, as severance pay, the payment to be covered in part by an insurance policy of the double-indemnity type owned and paid for by the corporation; on December 8, 1958 the resolution was amplified by a further resolution to clarify that the first resolution was intended to impose a contractual obligation on the corporation and that the payment to the surviving widow or estate (or as recited in the preamble, estate of certain of the corporate officers) was in recognition of past and future services rendered and to be rendered the corporation by the officers, payment to be made within 30 days following the officer's death. Mr. Bogley was present when the foregoing actions were taken. In March 1967 Prince Georges paid decedent's widow $60,000 and commencing in March 1967 BHM&L and Virginia paid plaintiff, the estate of decedent, $63,833 and $62,467.92, respectively, reported as income by the widow and plaintiff. In computing decedent's gross estate for federal estate tax purposes, plaintiff did not include said payments on the estate tax return filed in October 1968. A deficiency was assessed against the estate based on the estate's failure to include in the gross estate $181,874.41 which the District Director alleged was the commuted value of payments under the motion and resolutions. The deficiency was paid, the claim for refund was disallowed, and this suit was filed. Defendant contends that Bogley had an interest in the BHM&L and Virginia payments at death, citing Sec. 2033 of the 1954 Internal Revenue Code, or alternatively that Bogley had a general power of appointment under which he could name the beneficiary who would receive the payments, citing Sec. 2041 of the Code. Defendant asserts that the Prince Georges payments are not includable in Bogley's estate under Sec. 2033, but since the widow survived, Bogley made a transfer of his reversionary interest to her and thus Sec. 2037 of the Code requires the payments to be included in his estate if his reversionary interest exceeded 5% of the value of such property. Plaintiff contends the corporations were not contractually bound to make the described payments, that said Code sections are inapplicable, and that Bogley had a mere expectancy of payment and thus the payments were not required to be included in his gross estate. Defendant has agreed that if the cor-

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porations were not contractually obligated to make the payments and if decedent possessed a mere expectancy of payment, inclusion of the items in the gross estate was not required. It is *held* (1) that Bogley did not have enforceable contracts with BHM&L and Virginia during his lifetime, that the corporations were not contractually bound to make the payments, that Bogley possessed a mere expectancy of payment and that consequently inclusion of the payments in his gross estate for federal estate tax purposes was not required; (2) that the Prince Georges resolutions were sufficient as a unilateral promise and offer to Bogley by the corporation, that he accepted the offer by working until his death, that there was a meeting of the minds on the essential provisions of a contract, and that his performance was consideration for the contract; (3) that the value of the death benefit payments payable by Prince Georges was required to be included in Bogley's gross estate under 26 U.S.C. § 2037, since he made a transfer of his interest to his wife during his lifetime, he required that his wife survive him in order to receive payment, and he retained a reversionary interest in the payments exceeding 5% of their value immediately before his death; and (4) that the value of the reversionary interest as determined by the Commissioner was proper. The parties' motions for summary judgment are granted and denied consistent with the foregoing. Judgment is entered for plaintiff with respect to the deficiency assessment on the BHM&L and Virginia payments, plus interest as provided by law from December 23, 1971 to date of payment of this judgment. Plaintiff's petition for refund of the amount of the assessment on the Prince Georges' payment is dismissed. The case is remanded to the trial judge for determination of the amount due plaintiff.

Contracts; formation of contract; requisites of contractual obligation.

[1] In order to have a valid contract, one party must make an offer that is a promise which is conditional upon receipt by the offeror of some act or promise from the offeree, and the offer must be accepted as to all its terms by the offeree. The offeree must give in return for the offeror's promise exactly the consideration which the offeror requests and the acceptance must be made absolutely and unqualifiedly.

Contracts ⇐ 18, 22(1)

Contracts; formation of contract; consideration.

[2] A contract must be supported by sufficient and valuable consideration, i.e. a detriment incurred by the promisee or a benefit received by the promisor at the request of the promisor. Generally, past consideration is no consideration, nor is a promise to do what one is required by law or contract to do a valuable consideration.

Contracts ⇐ 51, 52, 75(1, 2), 79

Contracts; formation of contract; requisites of contractual obligation.

[3] Since an offer must be a promise, a mere expression of intention or general willingness to do something on the happening of a partic-

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ular event or in return for something to be received does not amount to an offer. Thus, the passage of a resolution or adoption of a motion by vote of corporate directors which provided that upon a corporate officer's death the corporation was authorized to pay his estate or named beneficiary the total compensation received by the officer for the past two years prior to his death was not an offer but merely an expression of an intention or policy where the officer was not required to promise anything or to do anything, there was no indication of the nature of the officer's future services, or compensation therefor, or length of services, or any mode provided for deciding such matters, and his employment could be terminated at any time by corporate action, by resignation or retirement.

Corporations ⇐ 308(3)

Contracts; words and phrases; "authorized."

[4] Where, under a corporate resolution, the directors were "authorized" upon the death of any officer to make described payments, the word "authorized" is a word of permission and not one of obligation in private contracts.

Corporations ⇐ 308(3)

Contracts; formation of contract; acceptance.

[5] Acceptance of an offer is necessary to create a simple contract, since it takes two to make a bargain.

Contracts ⇐ 22(1)

Taxes; estate tax; gross estate; exclusions from gross estate; expectancy of payment.

[6] Where it has been determined that the subject corporations were not contractually obligated to make the described payments, a mere expectancy of payment is not a property right, and the inclusion of the payments in decedent's gross estate for federal estate tax purposes is not required, decedent's widow and estate having reported the payments as income on federal tax returns.

Internal Revenue ⇐ 992

Contracts; formation of contract; requisites of contractual obligation.

[7] While a vote of a private corporation does not of itself amount to an offer, where the language of a corporate clarifying resolution provided that the prior resolution was intended to impose a contractual obligation on the corporation to make certain described payments in event of death of an officer and that said payments to the surviving widow or estate were in recognition of the officer's past services and those to be rendered to the corporation until his death, all of which was communicated to the officer, such statements constituted a unilateral promise and an offer. Acceptance of the offer was manifested by working for the corporation until death, performance being consideration for the contract.

Corporations ⇐ 308(3)

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Taxes; estate tax; gross estate; transfers taking effect at death.

[8] Before death benefits are required to be included in the present decedent's gross estate for estate tax purposes under 26 U.S.C. § 2037 pertaining to transfers taking effect at death, decedent must have (1) made a transfer of his interest to his wife during his lifetime, (2) his wife could only obtain the property by surviving him, and (3) he retained a reversionary interest in the payments which exceeded five percent of their value immediately before his death.

Internal Revenue ⇐ 992

Taxes; estate tax; gross estate, inclusions in; death benefit payments on account of employment.

[9] Where, under the terms of decedent's contract with Prince Georges via a resolution the latter was required to make certain described payments upon death to decedent's surviving widow or estate (or, as amplified in the preamble to the second resolution, the estate of certain of the corporate officers), decedent (1) made a transfer of his interest to his wife during his lifetime, (2) required that his wife survive him in order to receive payment, and (3) the intent and meaning of the resolutions was that the reversionary interest would go to decedent's estate rather than his wife's. Under the circumstances, the requirements of 26 U.S.C. § 2037 are met and the value of the payments was required to be included in decedent's gross estate if decedent's reversionary interest exceeded five percent of the value of the payments.

Internal Revenue ⇐ 992

Taxes; assessment of taxes; presumption and burden of proof; estate tax; transfers taking effect at death; value of reversionary interest.

[10] The Commissioner of Internal Revenue pursuant to regulations has the authority to determine a decedent's reversionary interest in property based upon tables and interest rates prescribed in regulations, and his determination is *prima facie* correct. Taxpayer not only must show that the regulations are unreasonable and unrealistic and that a more reasonable method of valuation is available, but also that decedent's reversionary interest was five percent or less of the value of the property within the purview of 26 U.S.C. § 2037.

Internal Revenue ⇐ 1527

Stephen D. Kahn, for plaintiff. *Jerry M. Hamovit*, attorney of record.

William Kalish, with whom was *Assistant Attorney General Scott P. Crampton*, for defendant. *Theodore D. Peyser* and *John E. Evans*, of counsel.

Opinion of the Court

Before COWEN, *Chief Judge*, SKELTON and BENNETT, *Judges*.

SKELTON, *Judge*, delivered the opinion of the court:

This is a suit by the Estate of Samuel E. Bogley, deceased, acting through Leonard S. Melrod and Warren Browning, Co-administrators, for the recovery of $32,380.10 federal estate taxes, plus interest thereon, assessed and collected from such estate by the Internal Revenue Service. The facts giving rise to the suit are as follows:

The decedent, Samuel E. Bogley, was, from 1955 until his death on January 8, 1967, an officer, employee and director in each of three corporations, namely, Bogley, Harting, Mahoney, and Lebling, Inc. (hereinafter BHM&L); Bogley, Harting, Mahoney, and Lebling of Virginia, Inc. (hereinafter Virginia); and Bogley, Harting and Hight of Prince Georges County, Inc. (hereinafter Prince Georges). At his death, Bogley also was a stockholder in each of the three corporations, owning 50 percent of the common stock of BHM&L, 28 percent of the common stock of Virginia, and 34 percent of the common stock of Prince Georges.

The directors of BHM&L passed a resolution and the directors of Virginia passed a motion during the 1950's providing that upon the death of each of their officers, the corporation was authorized to pay a certain sum to the officer's estate or beneficiary.

The resolution of BHM&L was passed on October 17, 1955, and it provided as follows:

> RESOLVED that in consideration of past services and services to be rendered by Samuel E. Bogley, Frederick G. Harting, Jr., and Frank S. Hight, Jr., the Corporation is authorized upon the death of any of these officers to pay their estate or named beneficiary the total compensation received by the officer for the past two years prior to his death. This payment is to be made monthly over a two-year period following the death of the officer.

On the same day the following *motion* was made and adopted by the Board of Directors of Virginia:

> In consideration of past services and services to be rendered by Samuel E. Bogley, Frederick G. Harting,

Jr., Joseph J. Mahoney, Jr. and Frank S. Hight, Jr., the Corporation is authorized upon the death of any of these officers to pay their estate or named beneficiary the total compensation received by the officer for the past two years prior to his death. This payment is to be made monthly over a two-year period following the death of the officer.

On November 10, 1958, the Board of Directors of Prince Georges adopted the following resolution:

> RESOLVED, that in the event of death of any of the present officers of the Corporation, namely: Samuel E. Bogley, Frank S. Hight, Frederick G. Harting, Jr., and William L. Lebling, Jr., the surviving widow or estate is to receive two years' salary based on amount being paid at time of death, as severence [sic] pay, this to be covered in part by an insurance policy of the double-indemnity type; owner of said policy to be Bogley, Harting & Hight of Prince Georges County, Inc. and expense of same to be borne by the Corporation.

The Prince Georges resolution was amplified by a further resolution of its Board of Directors on December 8, 1958:

> Whereas, a question has arisen with respect to the intent of a resolution passed by the Board of Directors of this Corporation on November 10, 1958, pertaining to the payment of two years' salary to the widow or estate of certain of the officers of this corporation and whereas it is desireable [sic] to clarify the fact that such resolution was intended to impose a contractual obligation on the corporation now, therefore, be it,
>
> RESOLVED, that the resolution providing that in the event of death of any of the present officers of the Corporation namely: Samuel E. Bogley, Frank S. Hight, Frederick G. Harting, Jr., and William L. Lebling, Jr., the surviving widow or estate is to receive two years' salary based on the amount being paid at the time of death, as severance pay, was in recognition of the past services theretofore rendered to this Corporation by the several said officers, and in consideration of the future services to be rendered by each of them, and be it further
>
> RESOLVED, that the payment of such sum shall be made within thirty (30) days after the date of death of such officer, or officers.

The decedent was present at the meetings when these actions were taken by the Boards of Directors of said corporations. He never designated anyone to receive payments from BHM&L and Virginia if they were made after his death. There is no evidence that the decendent ever communicated with the corporations, or they with him, regarding said corporate proceedings up to the time of his death.

The motion of Virginia and the resolutions of BHM&L and Prince Georges remained unchanged on their respective corporate minute books from the time they were passed and adopted until decedent's death, without any further action being taken by the corporations with reference to them.

The decedent was an officer and employee of the above corporations prior to and at the time the above motion and resolutions were passed and adopted. He continued as an officer and employee of such corporations until his death on January 8, 1967. He was 52 years of age when he died and at that time his wife was 38 years old.

On or about March 23, 1967, Prince Georges paid to decedent's widow the sum of $60,000. Commencing on or about March 20, 1967, and in monthly payments thereafter until fully paid, BHM&L and Virginia paid to the plaintiff, the estate of Samuel E. Bogley, the sums of $63,833 and $62,467.92, respectively. These amounts were reported as income on federal tax returns by the decedent's widow and the plaintiff.

On or about October 8, 1968, plaintiff filed a federal estate tax return on behalf of Samuel E. Bogley. In computing the decedent's gross estate for federal estate tax purposes, plaintiff did not include the above payments. The District Director assessed a deficiency against the estate based on the estate's failure to include in the gross estate the amount of $181,874.41, which he alleged was the commuted value of payments under the corporate motion and resolutions. After payment of the deficiencies and the filing and disallowance of a claim for refund, this suit was timely filed.

The defendant contends that the corporations made offers and promises to Bogley when they passed the motion and resolutions described above, and that Bogley accepted said offers by continuing to serve as an officer and employee of the

corporations until his death, and by reason of all of which they entered into binding contracts that Bogley could have enforced during his lifetime. From this premise, the defendant argues that the payments made by the corporations after Bogley's death had a commuted value when he died, and that such commuted value should have been included in his gross estate for estate tax purposes. To support this theory, the defendant relies on Section 2033 of the Internal Revenue Code of 1954 (26 U.S.C. § 2033 (1970)) with respect to the payments made by BHM&L and Virginia. Section 2033 provides in effect that the value of the gross estate of a decedent shall include the value of all property in which the decedent had an interest at the time of his death. The defendant contends that Bogley had an interest in the BHM&L and Virginia payments when he died. In the alternative, defendant says that even if decedent had no interest in the BHM&L and Virginia payments when he died, he had a general power of appointment under which he could name the beneficiary who would receive the payments, and, therefore, Section 2041 of the Code (26 U.S.C. § 2041 (1970)) required the payments to be included in his estate.

As to the Prince Georges payments, defendant says they are not includable in the decedent's estate under Section 2033 because they were payable to his wife after his death, but that since his wife survived him, he made a transfer of his reversionary interest to her and that by reason of such facts, Section 2037 of the Code (26 U.S.C. § 2037 (1970)) requires the payments to be included in his estate if his reversionary interest exceeds five percent of the value of such property, which defendant says is the case here.

The basic position of the plaintiff is that there were no contracts between Bogley and the three corporations, and that the corporations were not contractually bound to make the described payments. This being true, plaintiff asserts that the arguments and contentions of the defendant are invalid and that Sections 2033, 2041 and 2037 of the Internal Revenue Code of 1954 have no application to this case. The plaintiff says further that all that decedent had was a mere expectancy of payment by the corporations and that under

these circumstances, the payments were not required to be included in decedent's gross estate.

The defendant agreed in its brief and at oral argument that if the corporations were not contractually obligated to make such payments and that if the deceased possessed a mere expectancy of payment, the inclusion of the items in the gross estate of decedent would not be required. Therefore, the threshold question that must be resolved is whether or not enforceable contracts existed between Bogley and the three corporations that contractually bound them to make the described payments after Bogley's death. This requires an examination of the basic principles of contract law and the application of those principles to the facts of this case. A contract has been defined as follows:

> § 1. Contract. A contract is a promise, or set of promises, for breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty. [Footnote omitted.] [1 Williston, Contracts § 1 (1957) 3d. Ed.]

In *Farrington* v. *Tennessee*, 95 U.S. 679 (1877) the Supreme Court said:

> * * * [T]he ingredients of a contract are parties, consent, consideration, and obligation. * * * [*Id.* at 685.]

In the case of *Peoples Drug Stores, Inc.* v. *Fenton Realty Corp.*, 191 Md. 489, 62 A. 2d 273 (1948), the court defined a contract as follows:

> * * * To constitute a valid contract, the offer of one party must be certain and definite, and the acceptance of the other party must correspond with the offer in its entirety. A contract, to be final, must extend to all the terms which the parties intend to introduce, and material terms cannot be left for future settlement. Until actual completion of the bargain either party is at liberty to withdraw his consent and put an end to the negotiations. * * * [Cases omitted.] [*Id.* at 494, 62 A. 2d at 276.]

It is fundamental that in order to have a valid contract one party must make an offer that is a promise which is conditional upon receipt by the offeror of some act or promise from the offeree, and the offer must be accepted as to all its terms by the offeree. The offeree must give in return for

the offeror's promise exactly the consideration which the offeror requests and the acceptance must be made absolutely and unqualifiedly. *See* Restatement of Contracts § 32 (1932); *Reiser Company* v. *Baltimore Radio Show, Inc.*, 169 Md. 306, 181 A. 465 (1935); *Brown* v. *Fahey*, 157 Md. 481, 146 A. 264 (1929); *Belmont* v. *McAllister*, 116 Va. 285, 81 S.E. 81 (1914).

An expression of intention is not an offer. *See* 1 Williston, Contracts, *supra*, § 26, where it is stated:

> § 26. Expression of Intention is Not an Offer. Since an offer must be a promise, a mere expression of intention or general willingness to do something on the happening of a particular event or in return for something to be received does not amount to an offer. Therefore, * * * a vote of a private corporation, does not of itself amount to an offer, though it may be so communicated by the corporation to another as then to become an offer. [Footnotes omitted.]

This principle will be discussed further, *infra*. It is also fundamental that a contract must be supported by sufficient and valuable consideration, which has been defined as:

> * * * [A] detriment incurred by the promisee, or a benefit received by the promisor at the request of the promisor. * * * [Footnotes omitted.] [1 Williston, Contracts § 102 (1957).]

The general rule almost universally followed is that past consideration is no consideration. 1 Williston, Contracts, *supra*, at § 142. Also a promise to do what one is required by law or contract to do is not a valuable consideration. *See People's Banking Co.* v. *Fidelity & Deposit Co.*, 165 Md. 657, 170 A. 544 (1934); 13 C. J. *Contracts* §§ 207, 209 (1917); *Berger* v. *Burkoff*, 200 Md. 561, 92 A. 2d 376 (1952).

I

The BHM&L and Virginia Transactions

Applying the foregoing principles to the BHM&L and Virginia transactions, we find that the conditions and requirements necessary for valid and enforceable contracts with Bogley are entirely missing. The votes of the directors of the corporations in passing the motion and in adopting the

resolution were not offers nor promises to Bogley. They did not require him to promise anything nor to do anything. They referred to his past services and future services for the corporations, but there was nothing to indicate the nature of such future services, nor compensation to be paid for same, nor how long the services were to be performed; nor was any mode provided for deciding such matters. His employment could be terminated at any time by the corporations or by his resignation, or by his possible retirement.

We are convinced that the adoption of the motion and the resolution by the BHM&L and Virginia corporations were mere expressions of their intention or policy and did not amount to an offer to Bogley. *See* 1 Williston, Contracts, *supra* at § 26. This was the exact holding of the court in *Beverage Distributors, Inc.* v. *Olympia Brewing Co.*, 440 F. 2d 21 (9th Cir. 1971), *cert. denied*, 403 U.S. 906, where the court said:

> A gratuitous and unsolicited statement of policy or of intention which receives the concurrence of the party to whom it is addressed, does not constitute a contract. *Goetz* v. *State Farm Mutual Automobile Insurance Co.*, 31 Wis. 2d 267, 142 N.W. 2d 804, 807 (1966); 1 Williston on Contracts (3d ed., Jaeger) § 1A, p. 5. Or as it is sometimes stated, since an offer must be a promise, a mere expression of intention or general willingness to do something on the happening of a particular event or in return for something to be received does not amount to an offer. *Lahaina-Maui Corp.* v. *Tay Tet Hew*, 362 F. 2d 419 (9th Cir. 1966); *Winand* v. *Case*, 154 F. Supp. 529 (D. Md. 1957); *Parrish* v. *General Motors Corp.*, 137 So. 2d 255 (Fla. App. 1962); 1 Williston, *id.*, § 26, p. 59. [*Id.* at 29.]

This principle was reiterated by the court in *Bellows* v. *Porter*, 201 F. 2d 429 (8th Cir. 1953), in the following language:

> * * * A mere assurance that a party may act in a certain matter, standing alone, can not be converted into a contract. The rule is stated in Williston on Contracts, Vol. 1, Sec. 26, page 32, as follows:
>
> "Since an offer must be a promise, a mere expression of intention and general willingness to do something on the happening of a particular event or in return for something to be received does not amount to an offer."

Opinion of the Court

The applicable principle is stated in Page on Contracts, Vol. 1, 2nd Ed., Sec. 77, as follows:

"A declaration of intention to act in a certain way which does not show that the party who makes such declaration promises to act in such a way or intends to incur legal liability obliging him to act in such a way is not an offer which can be accepted so as to make contract."

The expression of an intention to do an act is not an offer to do it. Porter did not promise to do or to refrain from doing anything. He simply forecast what he might do in the future. The transaction is lacking in the elementary essentials of a binding contract. In any event it is not so accurate and certain as to warrant a court of equity to require its specific performance. * * * [*Id.* at 431.]

To the same effect is the decision of the court in *Winand* v. *Case*, 154 F. Supp. 529 (D. Md. 1957), where Winand sued to recover damages for breach of a written contract to employ him for life. The court denied relief saying that "at the most" the plaintiff had a contract of employment for an indefinite period, terminable at will. The court said:

The aforegoing conclusions aside, the plaintiff still, as a matter of law, could not recover. The wording of the letter of June 9, 1944, and in particular the wording of paragraph 3 therein, are subject to the criticism advanced by Judge Parker in Lucas v. Federal Reserve Bank of Richmond, 4 Cir., 1932, 59 F. 2d 617, 619:

"It is clear that the first cause of action states no ground of relief either in contract or in tort. The allegation that the Reserve Bank promised to 'extend such additional accommodations in the way of discounts as would be necessary to meet the additional burden assumed' sets forth none of the essential terms of a contract. It does not show the amount of credit to be extended, *the period of the credit*, the *amount or kind of security* to be deposited as collateral, or *the interest to be paid*. The court cannot see by reading it any definite agreement which the law could enforce. In the language of Mr. Justice Holmes, 'On the face of it, it does not import a legally binding promise, but rather a hopeful encouragement, sounding only in prophecy.' Hall v. First Nat. Bank of Chelsea, 173 Mass. 16, 53 N.E. 154, 155, 44 L.R.A. 319, 73 Am. St. Rep. 255. It is well settled that such a vague promise does not con-

stitute a binding and enforceable contract." * * * [Emphasis in original.] [Footnote omitted.] [*Id.* at 541–42.]

A case very much in point is *Asbury* v. *Hugh L. Bates Lodge No. 686, F. & A.M.*, 62 Ohio App. 430, 24 N.E. 2d 638 (1939), where a masonic lodge passed a resolution to buy certain realty from certain of its members for $15,000 and authorized its officers to purchase the property. The owners were present when the resolution was passed. Nothing more was done and the owners sued, claiming breach of a contract of purchase. The court held:

> Mere statements of intention, promissory expressions, or statements made to third persons are not sufficient, in themselves, to create contractual obligations. 17 Corpus Juris Secundum, Contracts, § 46, 387 et seq.; Upsal Street Realty Co. v. Rubin, 326 Pa. 327, 192 A. 481; Broad St. National Bank of Trenton v. Collier, 112 N.J.L. 41, 169 A. 552, 553; Stone v. Commonwealth Finance Corp., 127 Misc. 368, 216 N.Y.S. 639; Georgia Cane Products Co. v. Corn Products Refining Co., 141 Ga. 40, 80 S.E. 318. * * *
>
> This intramural action of the lodge did not create an extraneous obligation any more than a resolution reached in the secret places of the mind of a natural person would bind him to an offeror, whose offer he had thus concluded to accept. [*Id.* at 639.]

A similar case was *Benton* v. *Springfield Young Men's Christian Ass'n.*, 170 Mass. 534, 49 N.E. 928 (1898), where a Y.M.C.A. voted to reject all plans submitted for a new building, including those submitted by plaintiff architect, but voted to choose plaintiff to supervise the construction of the new building, but later rescinded this vote. Plaintiff contended a contract was made with him by the vote selecting him as the architect. The court rejected plaintiff's claim and held:

> * * * The vote did not specify any terms or duties in detail, and it was not in form or intention a contract or the offer of a contract. It was merely an initiatory step, signifying the intention or purpose of the committee, and was not an act by which they meant to be bound as by a contract. * * * [*Id.* at 929.]

Opinion of the Court

In the case of *Cumberland & O. V. R.R.* v. *Shelbyville, B. & O. R.R.*, 117 Ky. 95, 77 S.W. 690 (1903), the court held:

> * * * A resolution adopted on the part of the directory or at a stockholders' meeting of a corporation declaring their willingness to sell the corporate property at a certain figure, and empowering the president to consummate the sale by executing and delivering the necessary deed, will not alone be a contract of sale. *It is so far an unexecuted purpose or intention to sell.* * * * There was no time when the Shelbyville * * * Company was legally bound to convey its property to the Cumberland * * * Company. All that the parties undertook to do * * * was voluntary, and fell short of becoming obligatory as a contract, executed or otherwise. [Emphasis supplied.] [*Id.* at 692.]

A similar holding is found in the case of *Talley* v. *Curtis*, 23 Tenn. App. 181, 129 S.W. 2d 1099 (1939), where a tenant fell on defective stairs and sued the landlord, claiming the latter had promised to repair the steps long after the house had been leased to plaintiff. The court held for landlord, saying:

> The statement of defendant that, "I will have to put in new steps", * * * imported merely an intention on the part of defendant, rather than a covenant with plaintiff that he would "put in new steps."
>
> "Since an offer must be a promise a mere expression of intention or general willingness to do something on the happening of a particular event or in return for something to be received does not amount to an offer." Williston on Contracts, Vol. 1, sec. 26.
>
> "The mere expression of an intention or desire is not a promise; the promise is an undertaking to carry the intention into effect." 12 Am. Jurisprudence, page 498, sec. 3. [*Id.* at 1102]

In the case of *Stone* v. *Commonwealth Finance Corp.*, 127 Misc. 368, 216 N.Y.S. 639 (1924), *aff'd*, 215 App. Div. 704, 212 N.Y.S. 924 (1925), *aff'd*, 243 N.Y. 528, 154 N.E. 592 (1926), a letter from a finance corporation to its subsidiary, reciting its readiness to place its resources behind the subsidiary's project to establish a trade exposition to the extent necessary to insure its complete success and authorizing the subsidiary to use the letter in any way it saw fit, was held to be a mere statement of intent and not a contract with

prospective exhibitors or with the subsidiary for their benefit. The court said referring to the letter:

> * * * It lacks any expression which can be construed as an offer to enter into a contract. In a sense it is an assurance. But every expression in the nature of an assurance is not a guaranty. * * *
>
> *The letter is a mere statement of intention.* Neither an offer nor intent to assume contractual liability, nor the essential element of agreement, can be discovered or implied. * * * [Emphasis supplied.] [216 N.Y.S. at 641.]

Finally, on the matter of intention and policy not being sufficient as an offer, mention should be made of the case of *Borden* v. *Skinner Chuck Co.*, 21 Conn. Sup. 184, 150 A. 2d 607 (1958). There the court held:

> It is basic, however, that there must be an offer upon the employer's part. *A mere expression of intention or general willingness to do something on the happening of a particular event or in return for something to be received does not amount to an offer.* 1 Williston, Contracts (Rev. Ed.) § 26. * * * [Emphasis supplied.] [150 A. 2d at 610.]

We think the foregoing statement is unquestionably the law, and that accordingly all we have here in the corporate motion and resolutions were expressions of intention or policy and not offers to Bogley. The theory of the defendant is not helped by the fact that the resolution of BHM&L and the motion of Virginia contained the word "authorized" with respect to the payments.[1] The word "authorized" is a word of permission and not one of obligation in private contracts. *See* 17 Am. Jur. *Contracts*, § 281 (1964), and 4A Words and Phrases, *Authorization*, at 623, et seq.; *People* v. *Young*, 100 Ill. App. 2d 20, 241 N.E. 2d 587 (1968); *Midland Iron & Steel Corp.* v. *Chicago R.I. & P. Ry*, 4 Ill. App. 3d 369, 280 N.E. 2d 52 (1972); *Shopen* v. *Bone*, 328 F. 2d 655 (8th Cir. 1964); and *J.D. & H. Enterprises Corp.* v. *Byrne*, 12 Misc. 1066, 175 N.Y.S. 2d 726 (1958). The court there held:

> * * * The word "authorized" is a word of permission merely, and generally has that sense when used in con-

[1] The resolution of Prince Georges did not contain the word "authorized," but stated that "the surviving widow or estate is to receive [the payments]." Perhaps this has the same meaning as "authorized."

tracts in private affairs (People ex rel. Hilliker v. Pierce, 64 Misc. 627, 119 N.Y.S. 21, 26). * * * [175 N.Y.S. 2d at 728.]

To the same effect is the decision in *People ex rel. Hilliker* v. *Pierce*, 64 Misc. 627, 119 N.Y.S. 21 (1909). There the court held:

> In People v. Supervisors, supra, [51 N.Y. 401, 406] the court said:
> "The words 'authorized and empowered' are usually words of permission merely, and generally have that sense when used in contracts and private affairs; * * *. [119 N.Y.S. at 26.]

We pointed out above that "a vote of a private corporation does not of itself amount to an offer," 1 Williston, Contracts, § 26, *supra*. In addition to the cases cited in the foregoing paragraphs showing that this is the law, we call attention to the decisions of the courts in *Sears* v. *Kings County El. Ry.*, 152 Mass. 151, 25 N.E. 98 (1890); *Alabama Lime & Stone Co.* v. *Adams*, 218 Ala. 647, 119 So. 853 (1928); *Palmer* v. Stokely, 255 F. Supp. 674 (W.D. Okla. 1966); and *Hazard* v. *Hope Land Co.*, 69 A. 602 (R.I. 1908), where a corporation's directors voted "That G. B. Hazard be given the ice cream, candy, and pop corn privilege to November 1, 1909, for $1,200 per year." The court held:

> * * * In our opinion this vote cannot be construed as a completed contract in itself. * * * As the case stands on the record, we are of the opinion that *the vote in itself is not a completed contract*, but rather a preliminary to a contract to be made and carried out in the future, in some mode to be subsequently agreed upon by the parties, and is so uncertain and indefinite in its nature that in itself it is not a subject which equity will protect by means of an injunction. It is rather in the nature of an authority to the agents of the defendant to go forward and make a contract such as would be appropriate to effectuate the manifest intention of the parties. [Emphasis supplied.] [*Id.* at 603–04.]

It is stated in 1 Williston, Contracts, § 64:

> Acceptance of an offer is necessary to create a simple contract, since it takes two to make a bargain. * * *

It is clear that there was no acceptance by Bogley of any offer by BHM&L and Virginia because said corporations made no offers to him. Obviously, if there is no offer, there is nothing to accept.

For the foregoing reason, we hold that Bogley did not have enforceable contracts with BHM&L and Virginia during his lifetime, and that the corporations were not contractually bound to make the described payments. We hold therefore that Bogley possessed a mere expectancy of payment which is not a property right, and, consequently, the inclusion of the items in his gross estate was not required. *See Dimock* v. *Corwin*, 19 F. Supp. 56 (E.D.N.Y. 1937), *aff'd on other grounds*, 99 F. 2d 799 (2d Cir. 1938), *aff'd sub nom*, *United States* v. *Jacobs*, 306 U.S. 363 (1939). Accordingly, we do not reach the arguments of defendant with reference to sections 2033 and 2041 of the Internal Revenue Code of 1954 (26 U.S.C. §§ 2033, 2041) because they are not applicable to the BHM&L and Virginia transactions.

II

The Transactions Between Prince Georges and Bogley

Most of the infirmities pointed out above in the transactions between BHM&L, Virginia and Bogley did not exist in the dealings between Prince Georges and Bogley. There were many differences between the two situations which will be pointed out below.

The Prince Georges resolutions considered together showed a clear intent on the part of the corporation to enter into a binding contract with each of its officers, including Bogley, to pay their widows or estate two years' salary based upon the amount being paid at the time of death. This is definitely shown by the language of the second resolution as follows:

> * * * [W]hereas it is desireable [sic] to clarify the fact that such [prior] resolution *was intended to impose a contractual obligation on the corporation* * * *. [Emphasis supplied.]

While it could be argued that these resolutions were merely statements of intention or policy, as was the case with the

resolution and motion of BHM&L and Virginia, *supra*, we think that even if this was true, they were communicated to Bogley, who was present when they were adopted, in such a way as to amount to a promise and an offer. This is one of the exceptions to the general rule stated in 1 Williston, Contracts § 26 where it is stated in pertinent part:

> § 26. Expression of Intention is Not an Offer. * * * [A] vote of a private corporation, does not of itself amount to an offer, *though it may be so communicated by the corporation to another as then to become an offer.* [Emphasis supplied.] [Footnotes omitted.]

A careful reading of the resolutions shows that they were in fact a promise and an offer to Bogley that in recognition of his past services to the corporation [2] and in consideration of future services to be rendered by him to the corporation until his death, the corporation would pay his widow or estate two years' salary based on the amount being paid to him at the time of his death. While it is true the resolutions do not state what services he was to render in the future, nevertheless, the plain meaning of the resolutions was that he had to work for the corporation the rest of his life and be on its payroll at the time of his death. We can assume that there was an agreement between the corporation and Bogley as to the nature of his future services, as it is inconceivable that a contract would be made binding a person to work for a corporation the rest of his life without an understanding as to the work he would perform. Even if this one element was not specifically agreed upon, the contract would not be unenforceable, as an agreement was reached on all the other essential provisions of the contract.

It is also true that the compensation to be paid to Bogley was not specifically mentioned in the corporation's resolutions. However, his compensation was at least indicated by the second resolution dated November 10, 1958, wherein the corporation was obligated to purchase a $25,000 insurance policy of the double indemnity type on Bogley's life, effective December 1, 1958, to provide funds at least in part equal to two years' salary based on the amount

[2] Of course, past services are not consideration as pointed out above in our discussion of the BHM&L and Virginia transactions.

being paid to him at the time of his death. We can conclude from these facts that Bogley's salary was to be $25,000 or more per annum. As a matter of fact, the record shows that during the last two years of his life, Bogley's salary was $30,000 per year. Both parties agreed in their pretrial submission that the corporation had an insurance policy of the double indemnity type on Bogley's life *sufficient to cover the payment in issue here* ($60,000).[3] Evidently the original policy was later increased somewhat.[4] At any rate, the approximate amount of Bogley's salary was indicated in the second resolution by the amount of the insurance policy the corporation was required to buy.[5] After Bogley's death the corporation paid his widow $60,000 from the proceeds of the insurance policy.

We hold that these resolutions were sufficient as a unilateral promise and offer to Bogley by the corporation. The offer did not require a promise on the part of Bogley. He could accept it by performance, which he did by working for the corporation until his death. Also, there was a meeting of the minds on the essential provisions of a contract. Under these circumstances, there was a unilateral contract between the corporation and Bogley. His performance was consideration for the contract. *See* Restatement of Contracts §§ 12, 29 and 45 (1932).

It is not unusual for corporations to contract with officers and other employees to make payments to a surviving widow or other beneficiary in consideration of future services to be rendered by the officer or other employee. The test is whether or not an enforceable contract has been made. *See Kramer* v. *United States*, 186 Ct. Cl. 684, 406 F. 2d 1363 (1969); *Harris* v. *United States*, 72–1 U.S. Tax Cas. ¶12,845 (C.D. Cal. 1972); and *Worthen* v. *United States*, 192 F. Supp. 727 (D. Mass 1961).

[3] The record shows that BHM&L and Virginia also had double indemnity policies on Bogley's life, but, unlike Prince Georges, they were not required to buy them. Their policies were purchased voluntarily for their own protection.

[4] Bogley died as the result of an accident. This required the insurance company to pay double the face amount of the policy.

[5] The purchase of the insurance policy by Prince Georges is significant for another reason. It was a positive step taken by the corporation to carry out the promise and offer it had made to Bogley, which showed that the resolutions were not mere statements of intention or policy.

Having concluded that Bogley had an enforceable contract with Prince Georges at the time of his death, we will now consider whether or not section 2037 of the Internal Revenue Code of 1954 (26 U.S.C. § 2037) required the inclusion of the payments in his gross estate for estate tax purposes. Section 2037 provides in pertinent part as follows:

> § 2037. Transfers taking effect at death.
>
> (a) General rule.
>
> The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time after September 7, 1916, made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, if—
>
> (1) possession or enjoyment of the property can, through ownership of such interest, be obtained only by surviving the decedent, and
>
> (2) the decedent has retained a reversionary interest in the property (but in the case of a transfer made before October 8, 1949, only if such reversionary interest arose by the express terms of the instrument of transfer), and the value of such reversionary interest immediately before the death of the decedent exceeds 5 percent of the value of such property.
>
> (b) Special rules.
>
> For purposes of this section, the term "reversionary interest" includes a possibility that property transferred by the decedent—
>
> (1) may return to him or his estate, or
>
> * * * * *

It is clear from reading the above portions of section 2037, as applied to this case, that before the value of the payments were required to be included in Bogley's gross estate for estate tax purposes, he must have (1) made a transfer of his interest to his wife during his lifetime, (2) his wife could only obtain the property by surviving him, and (3) he retained a reversionary interest in the payments which exceeded five percent of their value immediately before his death.

As to the first requirement, we are of the opinion that Bogley did make a transfer of his interest to his wife during his lifetime by making the contract with Prince Georges.

This identical question was decided in *Estate of Fried*, 54 T.C. 805 (1970), *aff'd*, 445 F. 2d 979 (2d Cir. 1971), *cert. denied*, 404 U.S. 1016 (1972), where the court held:

> The inclusion of the death benefit in the gross estate is required by section 2037 of the Internal Revenue Code of 1954. The requirements for inclusion in the gross estate in this section are a transfer by the decedent a right to receive the benefit arising only through survival of the decedent, and the existence in the decedent of at least a 5% reversionary interest. Here the wife's right to receive the benefit was conditioned upon the death of the decedent and the decedent possessed a reversionary interest, since by the terms of the agreement if there were no widow the money was to pass to the decedent's estate. The estate does not seem to dispute that the value of the reversionary interest is greater than 5%. [445 F. 2d at 983.]

See also Worthen v. *United States*, *supra*, and *Kramer* v. *United States*, *supra*.

It is clear as to the second requirement that Bogley's wife had to survive him in order to receive the payment. The provisions of the Prince Georges resolutions plainly so provide. She did survive him and received the payment.

The third requirement is somewhat ambiguous as to whether the reversionary interest would go to Bogley's estate or his widow's estate. The first resolution provided:

> * * * [T]he surviving widow *or estate* is to receive two years' salary * * . [Emphasis supplied.]

This provision could be interpreted to mean that the reversionary interest would go to the widow's estate and not to Bogley's estate. The second resolution is somewhat different. The preamble to the resolution states:

> Whereas, a question has arisen with respect to the intent of a resolution passed by the Board of Directors of this Corporation on November 10, 1958, pertaining to the payment of two years' salary *to the widow or estate of certain of the officers of this corporation* * * *. [Emphasis supplied.]

This preamble to the resolution makes it appear that the reversionary interest would be payable to the estate of the officers of the corporation instead of to the widow's estate.

However, the second resolution, as distinguished from the preamble, is like the first in that it provided:

> * * * [*T*]*he surviving widow or estate is to receive two years' salary* * * *. [Emphasis supplied.]

Admittedly, it could be argued that the reversionary interest was to go to the widow's estate. It is a close question. However, we conclude that the intent and meaning of the resolutions was that the reversionary interest would go to Bogley's estate. That being true, the value of the payment was required to be included in Bogley's gross estate if his reversionary interest exceeded five percent of the value of the payment.

Pursuant to his authority under section 7805(a) to "prescribe all needful * * * regulations," the Secretary of the Treasury has promulgated regulations prescribing the manner and method to value a reversionary interest under section 2037.

Treas. Reg. § 20.2037–1(c)(3) (1972) on Estate Tax, provides in applicable part as follows:

> (3) For purposes of this section, [section 2037] the value of the decedent's reversionary interest is computed as of the moment immediately before his death, * * *. The value is ascertained in accordance with recognized valuation principles for determining the value for estate tax purposes of future or conditional interests in property. (See §§ 20.2031–1, 20.2031–7, * * *.) * * *

Section 20.2031–1(b) of the Regulations provides in pertinent part as follows:

> (b) Valuation of property in general. The value of every item of property includible in a decedent's gross estate under sections 2031 through 2044 is its fair market value at the time of the decedent's death, * * *.

Section 20.2031–7 of the Regulations provides in pertinent part as follows:

> (a) In general. (1) For estates of decedents dying on or before December 31, 1970, * * * the fair market value of * * * reversions is their present value determined under this section. * * *
>
> (2) * * * For purposes of the computations de-

scribed in this section, the age of a person is to be taken as the age of that person at his nearest birthday.

* * * * *

(e) Actuarial computations by the Internal Revenue Service. If the valuation of the interest involved is dependent upon the continuation or the termination of more than one life or upon a term certain concurrent with one or more lives, a special factor must be used. The factor is to be computed upon the basis of the Makehamized mortality table appearing as Table 38 of United States Life Tables and Actuarial Tables 1939–1941, published by the United States Department of Commerce, Bureau of Census, and interest at the rate of 3½ percent a year, compounded annually. * * *

Applying the table and interest rate prescribed by Regulations section 20.2031–7(e), the Commissioner determined that decedent's reversionary interest in the Prince Georges contract immediately before his death exceeded five percent of the value of the subject property. The Commissioner's determination of value based on the use of tables and interest rates prescribed by Regulations is *prima facie* correct. *Bowden* v. *Commissioner*, 234 F. 2d 937 (5th Cir. 1956), *cert. denied*, 352 U.S. 916. The taxpayer not only must show that the Regulations are unreasonable and unrealistic and that a more reasonable method of valuation is available, but also that the decedent's reversionary interest was five percent or less of the value of the property. *See United States* v. *Correll*, 389 U.S. 299 (1967), *McMurtry* v. *Commissioner*, 203 F. 2d 659 (1st Cir. 1953). The taxpayer has failed to carry this burden. In fact, the value as determined by the Commissioner has not been challenged by the plaintiff.

Accordingly, defendant's motion for summary judgment is denied and plaintiff's cross motion is granted as to the payments made by the BHM&L and Virginia corporations to Bogley's widow in the sums of $63,833 and $62,467.92, respectively, and judgment is entered for plaintiff for the amount of the deficiency assessment made by the Commissioner by reason of such payments, plus interest thereon as provided by law from December 23, 1971, the date the assessment was paid, to the date of the payment of this judgment to plaintiff by defendant.

Syllabus

Defendant's motion for summary judgment is granted and plaintiff's motion for summary judgment is denied with respect to the deficiency assessment made by reason of the Prince Georges payment of $60,000 to Bogley's widow, and plaintiff's petition for a refund of the amount of such assessment is dismissed.

The case is remanded to the trial judge for a determination of the amount due the plaintiff under Rule 131(c) by reason of this judgment.

JOHN SAMUEL AUSTIN v. THE UNITED STATES

[No. 5–74. Decided April 16, 1975]

ON PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

Court of Claims jurisdiction; discharge; correction of service records; absence without leave; forfeiture of pay and allowances.—Plaintiff, a Navy enlisted man, during his third enlistment and while on leave, was arrested in Mexico, and was subsequently convicted of trafficking in morphine, sentenced to a Mexican jail for 4 years, released on his bond after serving 484 days, and was returned to his duty station in California. For the period of his Mexican confinement he was listed as on unauthorized absence, was not given Navy pay, and his enlistment was extended 484 days to make up for the time lost. Plaintiff was processed for discharge by a Board of Officers pursuant to provision in the Navy Personnel Manual making such processing for possible discharge mandatory for those convicted by civil authorities (foreign or domestic) of an offense for which the maximum penalty under the Uniform Code of Military Justice is death or confinement in excess of 1 year. The Board recommended an undesirable discharge, and while first approving the recommendation the Chief of Naval Personnel later ordered the character of the discharge changed to general, under honorable conditions, and plaintiff was so discharged including a code meaning that he was not recommended for reenlistment. Plaintiff has petitioned this court for correction of his record to delete the discharge and also seeks back pay, claiming that the Mexican conviction could not be the basis for his discharge because it was obtained through use of a confession extracted from him by torture. The court *holds* (1) that it is without authority to consider the merits of plaintiff's claim since the only suits of which it has jurisdiction under 28 U.S.C. § 1491 (Supp. III 1973) are those in which the plaintiff has paid money over to the Government, directly or in effect, and seeks return of all or part

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thereof, or where the particular provision of law relied upon grants him, expressly or by implication, a right to be paid a certain sum. Furthermore, the affirmative relief of Pub. L. 92–415 is only available where this court enters a money judgment; (2) that since a serviceman has no right to reenlist at the expiration of his current enlistment (absent statutory provision therefor) and back pay is thus confined to the current enlistment, plaintiff, whose term was extended by various legal proceedings delaying his actual discharge to beyond the time of scheduled discharge during which he was paid, has no money claim against the Government; (3) the Navy properly applied the pertinent pay statutes and regulations; and (4) plaintiff has no valid claim for payment for the 484 days his term was extended. Defendant's motion for summary judgment is granted, plaintiff's cross-motion is denied and the petition is dismissed.

Court of Claims jurisdiction; generally.

[1] The only suits of which this court has jurisdiction under 28 U.S.C. § 1491 (Supp. III, 1973) are those in which the plaintiff seeks and can seek a money judgment, i.e. where the plaintiff has paid money over to the Government, directly or in effect, and seeks return of all or part thereof, or where he alleges that the particular provision of law relied upon grants him, expressly or by implication, a right to be paid a certain sum.

Courts ⇐ 409(1)

Court of Claims jurisdiction; declaratory judgment.

[2] Since the general jurisdiction of this court is limited to money claims against the Government, the court does not have authority to enter a declaratory judgment or to grant affirmative non-monetary relief unless it is tied and subordinate to a monetary award. *United States* v. *King*, 395 U.S. 1 (1969).

Courts ⇐ 470
Declaratory Judgment ⇐ 274

Court of Claims jurisdiction; implementation of judgment.

[3] The affirmative relief permitted by the first sentence of Pub. L. 92–415, 86 Stat. 652, can be given only where a money judgment is entered; that is the "judgment" of which the statute speaks.

Courts ⇐ 470

Military pay; reenlistment, right to; generally.

[4] Absent a mandatory right to reenlist, enlisted personnel have no right of reenlistment at the expiration of their current enlistments, and a claim for active duty back pay by reason of alleged wrongful discharge is confined to the current enlistment.

Armed Services ⇐ 28.5

Military pay; leave; absence without leave; forfeiture of pay and allowances.

[5] Under 37 U.S.C. § 503(a) a serviceman's pay may be withheld for the time during which, on his own, he is not available for duty.

Opinion of the Court

The legislative history of 10 U.S.C. § 972 (1970) as implemented by 32 C.F.R. § 730.4a (1974) authorizing the Navy to require an enlisted man to make up time lost under certain circumstances, indicates that its purpose was to discourage a serviceman from absenting himself by reason of his own injudicious conduct and thus making himself unavailable for duty. Where plaintiff, a Navy enlisted man, was in Mexico of his own choice and while there was arrested, convicted of trafficking in morphine and confined 484 days, the Navy could rightly find on the basis of his own explanation that he was seeking to entrap morphine dealers that plaintiff's absence was not unavoidable and that he was absent without proper authority while so detained, and under the circumstances, in withholding his pay for 484 days the Navy properly applied the statutes and regulations.

Armed Services ⇐ 23

Richard P. Fox, attorney of record, for plaintiff. *Richard P. Fox and Max Gest*, of counsel.

Kenneth J. Ingram, with whom was *Assistant Attorney General Carla A. Hills*, for defendant.

Before DAVIS, KASHIWA, and KUNZIG, *Judges*.

DAVIS, *Judge*, delivered the opinion of the court:

John Samuel Austin, then a Navy enlisted man, was discharged in December 1969 with a general discharge, under honorable conditions, for misconduct. He has petitioned this court for a correction of his military records to delete the discharge, and also for an award of back pay. Both sides have asked for summary judgment.

The record shows that Austin was serving his third enlistment in the Navy when, on June 19, 1965 while on leave, he was arrested by Mexican authorities at Tijuana and charged with possession of and trafficking in morphine. He and a Mexican national were subsequently convicted by a Mexican court of the trafficking charge and Austin was sentenced to a Mexican jail for four years from the date of his arrest. On October 18, 1966, having posted a substantial bond, he was released from the foreign jail and returned to his duty station at the Naval Missile Center, Point Mugu, California. For the period of his Mexican confinement, he was listed as on unauthorized absence, and was not given his

Navy pay. In addition, his enlistment was extended 484 days to end on March 24, 1969, to make up for the time lost.

After his return to naval duty, Austin was processed for an administrative discharge by a Navy Board of Officers under a section of the Navy Personnel Manual making such processing for possible discharge mandatory for those convicted "by civil authorities (foreign or domestic) * * * of an offense for which the maximum penalty under the Uniform Code of Military Justice is death or confinement in excess of 1 year; * * *" 32 C.F.R. § 730.13(b)(1) (1974). This board, before which plaintiff appeared (represented by both military and civilian counsel) and testified, recommended that he be given an undesirable discharge because of the Mexican conviction. The Chief of Naval Personnel originally approved this recommendation, but in December 1969, he ordered the character of the discharge changed to general, under honorable conditions, and plaintiff was given such a discharge, which included a code meaning that he was not recommended for reenlistment.

Plaintiff asserts in this action, as he has in several District Court suits brought to prevent his discharge, that the Navy acted improperly in separating him, because the discharge was based entirely on the Mexican conviction even though he had presented to the Board of Officers evidence that the conviction was primarily obtained through use of a confession extracted from him by torture. The Board of Officers appeared to be strongly of the view that it could not go behind the Mexican conviction or pass in any way upon Austin's allegations that that conviction was obtained in a foreign country under conditions wholly incompatible with concepts of natural law and fundamental fairness.

This is not an easy problem to unravel but we find that we need not even consider it because the court is without authority to reach that issue. The reason we have no power to assess the underlying substantive issue is that, even if plaintiff were to prevail on his claim that the Mexican conviction could not rightly be the basis for his discharge, we could not award him any back pay or other money compensation or damages. It is of course a cardinal principle of

our jurisprudence that the only suits of which we have jurisdiction under 28 U.S.C. § 1491 (Supp. III, 1973) (our general jurisdictional statute) are those in which the plaintiff seeks and can seek a money judgment. We may not give any relief unless "the plaintiff has paid money over to the Government, directly or in effect, and seeks return of all or part of that sum; * * * [or he alleges] that the particular provision of law relied upon grants the claimant, expressly or by implication, a right to be paid a certain sum." *Eastport S.S.* v. *United States*, 178 Ct. Cl. 599, 605, 372 F. 2d 1002, 1007 (1967). Conversely, it is now firmly established that, since the general jurisdiction of this court is limited to money claims against the Government, we have no authority to enter a declaratory judgment, or to grant affirmative nonmonetary relief unless it is tied and subordinate to a monetary award. *United States* v. *King*, 395 U.S. 1, 5 (1969); *Jankovic* v. *United States*, 204 Ct. Cl. 807 (1974). The affirmative relief permitted by the first sentence of Public Law 92–415, the Act of August 29, 1972, 86 Stat. 652,[1] can be given only where a money judgment is entered; that is the "judgment" of which the statute speaks. *See Jankovic* v. *United States*, *supra*.

Why is it that we cannot grant this plaintiff a money judgment if he should win on the merits of his claim? In the decisions dealing with enlisted personnel, the court has consistently held that since these servicemen have no right to reenlist at the expiration of their current enlistments, the United States has undertaken to pay them only to the end of the current enlistment, unless it properly discharges them prior to that time. *Rowe* v. *United States*, 167 Ct. Cl. 468, 470–72 (1964), *cert. denied*, 380 U.S. 961 (1965). Thus, for example, in *Clackum* v. *United States*, 148 Ct. Cl. 404, 296 F. 2d 226 (1960), where we found the discharge invalid because of the grossest sort of procedural and constitutional irregularity, 148 Ct. Cl. at 409–10, 296 F. 2d at 229, we lim-

[1] "To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States."

ited recovery to the period between the time of the illegal discharge and the end of that plaintiff's then-current enlistment. 161 Ct. Cl. 34, 36 (1963). *See also* to the same effect, *Murray* v. *United States*, 154 Ct. Cl. 185, 191 (1961); *Sofranoff* v. *United States*, 165 Ct. Cl. 470, 479 (1964); *O'Callahan* v. *United States*, 196 Ct. Cl. 556, 559–62, 451 F. 2d 1390, 1392–93 (1971).

In two cases we did find that an enlisted man had a firm right to reenlist, and therefore that his recovery did not end with the termination of his then enlistment. *See Diamond* v. *United States*, 170 Ct. Cl. 166, 344 F. 2d 703 (1965); *Smith* v. *United States*, 155 Ct. Cl. 682 (1961). However, as pointed out in *O'Callahan* v. *United States*, *supra*, 196 Ct. Cl. at 561–62, 451 F. 2d at 1393, both those holdings were grounded in special statutory rights of reenlistment. While we would be inclined to the same result if the Navy had bound itself by regulation to an automatic right of reenlistment, *see Service* v. *Dulles*, 354 U.S. 363, 388 (1957); *United States* v. *Nixon*, 418 U.S. 683, 695–96 (1974), we have not been cited to nor have we in our own research found any statute or regulation which would give this plaintiff such a mandatory right to reenlist.

This rule that back pay is confined to the current enlistment—in the absence of a mandatory right to reenlist—puts Austin's demand beyond our power to remedy. By various legal proceedings he delayed his actual discharge (December 24, 1969) nine months beyond the scheduled end of his enlistment, as extended (March 24, 1969). He was in fact paid to the later date and therefore now has no money claim against the Government.[2]

We have considered, in this connection, the point that plaintiff might possibly have a valid claim (if he is right as to the status of the Mexican conviction) for the 484 days for which he was not paid while he was in jail in Mexico, but have concluded that such a claim is unsound under the gov-

[2] While plaintiff held an AT1 pay rating prior to his Mexican adventures, he was reduced to ATR2 by non-judicial punishment in November 1966, and served out his enlistment at that rate. Plaintiff has not contested in this court this non-judicial punishment and demotion, and we do not consider the possibility that that action might have raised a monetary claim.

erning statutes and regulations. Section 503(a) of title 37 of the U.S. Code states that

> A member of the Army, Navy, * * * who is absent without leave or over leave, forfeits all pay and allowances for the period of that absence, unless it is excused as unavoidable.

This provision is in the title of the Code dealing with pay, and not that concerned with punishment. Its statutory background is in pay legislation where, for example, absence with authorization in excess of that allowed by statute is similarly treated. *See* Act of Aug. 9, 1946, ch. 931, § 4, 60 Stat. 964; Act of Aug. 4, 1947, ch. 475, § 1, 61 Stat. 748. The section is clearly nonpunitive; it is meant merely to withhold pay from servicemen for time during which, on their own, they are not available for duty.

Correlative to 37 U.S.C. § 503(a) are the provisions authorizing an extension of service to make up lost time. The pertinent Navy regulation is 32 C.F.R. § 730.4a (1974), based on 10 U.S.C. § 972 (1970), which allows the Service to require an enlisted man to make up time lost when he, among other things:

> (2) is absent from his organization, station, or duty for more than one day without proper authority, as determined by competent authority;
> (3) is confined for more than one day while awaiting trial and disposition of his case, and whose conviction has become final;
> (4) is confined for more than one day under a sentence that has become final; * * *

The history of this statute indicates that its purpose was to discourage any sort of absence by which a serviceman, by his own injudicious conduct (including, for example, intemperate use of liquor), makes himself unavailable for duty. *See* Act of July 24, 1956, ch. 692, 70 Stat. 631; Act of June 4, 1920, ch. 227, Art. 107, 41 Stat. 809; S. REP. No. 2549, 84th Cong., 2d Sess. (1956).

In this case the Navy could rightly find that, on any view of the facts, plaintiff's absence was not unavoidable and that he was absent without proper authority while detained in Mexico. Even if the Mexican conviction is deemed in itself

to be an improper basis for loss of pay and extension of service, the undenied fact is that Austin, of his own choice, was in Mexico in connection with drug activities and that he was arrested there while in the course of trying to arrange a transfer of narcotics. He insists that he engaged in these activities solely in order to entrap others and to receive the bounties available for turning smugglers over at the border. Whether or not his motives were so law-abiding, there is no doubt that plaintiff, not a narcotics agent or a member of the Naval Intelligence Service, had no duty to engage in such activities, and that he therefore absented himself from his post by his own actions, combined of course with the bad luck of his having picked an FBI agent to attempt to entrap. We think, therefore, that the statutes and regulations were properly applied in his case, and he does not have a valid claim for payment for the 484 days.

On this basis, we grant the defendant's motion for summary judgment, deny the plaintiff's motion, and dismiss the petition. Plaintiff is, of course, free to bring suit for the declaratory relief we are unable to grant in the appropriate federal district court.

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513 F. 2d 1396

MANPOWER INC. OF TIDEWATER v. THE UNITED STATES

[No. 230–74. Decided April 16, 1975]

ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Contracts; disputes; administrative remedies; delay by contracting officer in rendering decision on dispute; obligation of Government; breach.—Plaintiff claims breach of contract by defendant's unreasonable delay in rendering a decision on plaintiff's claim and by an unreasonable, arbitrary and capricious refusal to consider plaintiff's claim as submitted. Defendant has moved to dismiss the petition on the ground that plaintiff has failed to exhaust its administrative remedies. Plaintiff asserted that during contract performance its work was seriously obstructed by various disruptions of the Government and failures to supply proper equipment and facilities, and submitted a claim under the Changes clause for an equitable adjustment in contract price due to these alleged constructive changes. After an elapse of over 2 years during which no administrative action was taken on the claim, plaintiff inquired as

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to its status, notifying defendant that if there was no resolution of the claim at the contracting officer level within 60 days it would pursue further administrative and legal remedies. A month and a half later the contracting officer advised plaintiff that its "total cost method" of measuring its claim was unacceptable and invited plaintiff to submit additional data to support its demand. Plaintiff did not reply but filed the present suit. It is *held* that under the circumstances plaintiff had the right to institute the present action. The letter from the contracting officer was not a final decision but a request for further information; it is defendant's obligation to see that a proper "final decision" is rendered and not the contractor's; since this action was commenced *prior* to either an informal or a formal adverse determination, the rationale of *Clement Bros.* v. *United States*, 190 Ct. Cl. 50, 418 F. 2d 1356 (1969), is inapplicable; and since there was an unreasonable delay in the administrative process, the Government breached its implied obligation to resolve the dispute in a reasonable time. Defendant's motion for summary judgment is denied and the case is remanded to the trial division for appropriate proceedings on the merits of plaintiff's contractual claim.

Contracts; Government's obligation to contractor; proper "final decision."

[1] It is the Government's obligation, not the contractor's to see that a proper "final decision" is rendered once a claim has been tendered. That the administrator originally handling the claim left Government employment shortly after the filing thereof without informing anyone of the claim's pendency does not excuse defendant's delay of over 2 years in rendering a decision.

United States ⇐ 73(13)

Contracts; contracting officer; finality of contracting officer's decision.

[2] A letter from the contracting officer in response to the contractor's claim under the Changes clause for an equitable adjustment in contract price which invited further submissions by the contractor is not a final decision within the purview of the Disputes clause.

United States ⇐ 73(13)

Contracts; breach; delay by contracting officer in rendering decision on dispute.

[3] Where the administrative processing of plaintiff's claim for an equitable adjustment under the Changes clause of the contract was delayed for over 2 years and where plaintiff had given fair warning of its intent to pursue legal remedies within 60 days, absent resolution of the claim by the contracting officer plaintiff was justified in suing directly in this court since the Government breached its implied obligation to resolve disputes in a reasonable time.

United States ⇐ 74(8)

Per Curiam

Contracts; disputes; administrative remedies; failure to exhaust; delay by contracting officer in rendering final decision.

[4] Under standard Disputes clause, plaintiff need not appeal failure of contracting officer to render, within a reasonable time, final decision to Board of Contract Appeals before filing suit in this court.

United States ⇐ 74(8)

F. Trowbridge vom Baur, attorney of record, for plaintiff. *vom Baur, Coburn, Simmons & Turtle, Monroe E. Freeman* and *James M. McHale*, of counsel.

Gerald L. Schrader, with whom was *Assistant Attorney General Carla A. Hills*, for defendant.

Before COWEN, *Chief Judge*, DAVIS and NICHOLS, *Judges*.

PER CURIAM: At issue here is whether the Government breached its contractual obligation, under the Disputes clause, to have its contracting officer render a timely decision, thus freeing the plaintiff-contractor to file suit in this court without exhausting its administrative remedies. In July 1971 plaintiff Manpower Inc. of Tidewater entered into a contract with the Navy to furnish complete segregation, identification, inventory, location and data processing services for material taken from the USS FORRESTAL and deposited in warehouses in the Norfolk/Portsmouth area. In the course of performance the company considered that its work was seriously obstructed by various disruptions of the Government and failures to supply proper equipment and facilities. On October 22, 1971, it submitted a claim under the Changes clause for an equitable adjustment in the contract price due to these alleged constructive changes. This claim was revised, supplemented and clarified by letters of November 12, 1971 and January 25, 1972. The amount sought was on the order of $20,000.

The claim and letters were received by the Navy but nothing was done about them for over two years; because of a change of personnel, the claim appears to have been simply left in limbo without any processing or action. On March 18, 1974, plaintiff inquired about its claim. The Navy then discovered that nothing at all had been done and asked

for a copy of the November 12th letter which could not be found in the Government's file; this was provided by plaintiff. On May 3, 1974, the contracting officer advised plaintiff that the method by which the latter had chosen to measure its claim—which the defendant called the "total cost method"—was unacceptable and invited the company to submit additional data to support its demand.

The plaintiff did not respond but filed suit in this court on June 26, 1974. The petition asserted that (a) the contracting officer's "delay in acting on Plaintiff's claim and his present refusal to render a decision on the grounds stated in his letter of 3 May 1974, are arbitrary, unreasonable and capricious in light of the detailed claim submission made by Plaintiff more than two years ago," and (b) "Defendant's delay in acting on Plaintiff's claim and Defendant's present refusal to render a decision is a breach of the Disputes clause as to those elements of Plaintiff's claim that might otherwise be adjustable under the contract, discharging Plaintiff from any obligation to pursue administrative remedies with respect thereto."

Defendant has moved for summary judgment on the ground that plaintiff is required to pursue and exhaust its contractual remedy before coming to court. We agree, however, with plaintiff that in these circumstances it had the right to institute the action.

The more-than-two-year delay in rendering a final decision was obviously far too long for a claim of this moderate size and relatively uncomplicated character (*Universal Ecsco Corp.* v. *United States*, 181 Ct. Cl. 10, 18, 385 F. 2d 421, 425–26 (1967); *New York Shipbuilding Corp.* v. *United States*, 180 Ct. Cl. 446, 462, 385 F. 2d 427, 436 (1967); *Oliver-Finnie Co.* v. *United States*, 150 Ct. Cl. 189, 196–97, 279 F. 2d 498, 503 (1960)), and, just as obviously, the Navy was in no way excused because the administrator originally handling the matter left Navy employment, shortly after the filing of the claim, without informing anyone about the claim's pendency. Defendant says that plaintiff was at fault for letting two years go by without making an inquiry, but we have said that "It is the Government's obligation, not the contractor's, to see that a proper 'final decision' is

rendered once a claim has been tendered." *Zidell Explorations, Inc.* v. *United States*, 192 Ct. Cl. 331, 336–37, 427 F. 2d 735, 738 (1970). A contractor is not required to continue to press the Government agency to decide his claim. It is the defendant's obligation to take that step in reasonable time.

The Government's next argument is that the contracting officer's letter of May 3, 1974, was in effect an adverse decision,[1] that the company was aware of the Navy's adverse position, and that the Navy's failure to issue a technical "final decision" was formal rather than substantial. We cannot accept this contention because the May 3d letter, rather than definitively rejecting the claim, invited further submissions by the contractor. The last sentence said: "In order to give your claim proper consideration, it will be necessary to adequately support your allegations as well as costs claimed." This is not a rejection, but a request for further information.[2]

Relying on *Clement Brothers Co.* v. *United States*, 190 Ct. Cl. 50, 418 F. 2d 1356 (1969), defendant then urges that at no time, before filing suit, did Manpower Inc. of Tidewater wash its hands, because of the delay, of the administrative process. That rule of *Clement Brothers* applies, however, only where action is commenced *after* the administrative decision has been handed down. Here, suit was filed before either an informal or a formal adverse determination. Indeed, plaintiff gave fair warning when its letter of March 18, 1974 ended by saying: "If we have not resolved this claim at the contracting officer level within sixty days of your receipt of this letter, we shall pursue our further administrative and legal remedies." This suit was not commenced until more than sixty days thereafter (June 26, 1974)—and no resolution had come forth from the contracting officer by that time.

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[1] The letter said, among other things, that the "total cost" method "is totally unacceptable for pricing an equitable adjustment for claimed constructive changes."

[2] The Government has itself furnished an affidavit of the then contracting officer which says that he considered the contractor's presentation inadequate and adds: "I decided to allow the contractor a further opportunity to support its claim rather than to summarily reject the claim" or allow it in a minimal sum. "I gave this opportunity to the contractor by my letter of May 3, 1974."

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Finally, defendant argues that the company's only remedy was to appeal to the Armed Services Board of Contract Appeals on the ground that the contracting officer had unreasonably delayed his decision. In *Sun Shipbuilding & Dry Dock Co.* v. *United States*, 198 Ct. Cl. 693, 702 n. 12, 461 F. 2d 1352, 1357 n.12, *cert. denied*, 409 U.S. 1023 (1972), we pointed out that that contractor could have made the contracting officer's failure to act the subject of a "dispute," but that was because the particular Disputes clause specifically declared that any "omission" of the contracting officer could be the subject of a dispute. The standard Disputes clause, involved here, is quite different in wording, and it is not easy to read it as vesting jurisdiction in the Board of Contract Appeals over the failure of the contracting officer to render a decision. In any event, we are not disposed to rule that a contractor's only remedy is to ask for relief from the Board of Contract Appeals. An established line of decisions of this court has held that, if there is unreasonable delay in the administrative process, the Government has thereby breached its implied obligation to resolve disputes in a reasonable time, and the contractor can then sue directly in this court if it wishes to do so. *See Sun Shipbuilding & Dry Dock Co.* v. *United States*, *supra*, 198 Ct. Cl. at 707–08, 461 F. 2d at 1361. To insist that the contractor must seek his relief from the Board of Contract Appeals would run counter to this settled principle.

For these reasons, we deny defendant's motion for summary judgment and remand the case to the trial division for trial or other appropriate proceedings to determine the merits of plaintiff's contractual claim.

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513 F. 2d 608

DOUGLAS W. ABRUZZO v. THE UNITED STATES

[No. 141–73. Decided April 16, 1975]

ON THE PROOFS

Military pay; correction of military records; promotion; back pay and allowances; interservice transfer; per diem.—Plaintiff asks the court to set aside his release from active duty, to award him a date

Syllabus

of rank of captain commensurate with his peer group, to grant him full pay and allowances of an active-duty officer from the date of his release from active duty, to order his appointment as an active-duty reserve officer in the Air Force for a tour of duty of not less than 3 years, to direct the service to reevaluate the diagnosis that he was suffering from delusions of discrimination and was paranoid, and to award per diem accrued while he was on active duty with the Marine Corps. Plaintiff, a Marine Corps reserve officer and a former fighter pilot in Vietnam, upon his return to the United States requested an interservice transfer to the Air Force. However, the Marine Corps failed to properly process the request and the Air Force never received it. Meanwhile, plaintiff became involved in some incidents resulting in nonjudicial punishment and hospitalization for psychiatric treatment, first at the Charleston, South Carolina naval hospital to which he had been transferred "by service records" from his permanent duty station in Beaufort, South Carolina, and then the hospital transferred him to the naval hospital at Philadelphia, Pennsylvania "for duty awaiting appearance before the Physical Evaluation Board." By the time he was declared fit for duty, his obligated 3 years of duty had been completed and he was released from active duty. He appealed for relief, and during the proceedings he was passed over for promotion a second time and was involuntarily discharged. The Board for Correction of Military Records, relying on a medical opinion that plaintiff's actions were reasonably attributable to a psychotic condition, directed removal from his records of all material regarding the nonjudicial punishment and the adverse fitness report, and directed that his records be corrected to show that he was not previously considered for promotion; but the Board claimed lack of jurisdiction to take action on his transfer request. Plaintiff's discharge was cancelled, he was reinstated and was selected for promotion to captain. His present suit followed. As concluded by the trial judge, whose opinion and findings the court *adopts* as the basis for the judgment in this case, plaintiff has failed to show that the Board acted arbitrarily or capriciously in affording plaintiff the relief it did, or that plaintiff is entitled to any additional relief that is within the power of this court to grant. The trial judge also concluded that Charleston was plaintiff's permanent duty station, that Philadelphia was a temporary duty station, and that plaintiff is entitled to recover on his claim for per diem in the sum of $2,826, and judgment is entered for that sum. Otherwise plaintiff is not entitled to recover and the petition is dismissed. The court emphasizes that it does not wish to be understood, and it does not understand the trial judge as holding, that Correction Boards, under 10 U.S.C. § 1552(a), lack authority to grant backdated promotions in appropriate cases.

Military pay; active duty; release from active duty; reserves.

[1] Under 10 U.S.C. § 681(a), reserve officers can be released from active duty at any time, and the conditions and circumstances gov-

Syllabus

erning that release rest within the sound discretion of the service. Thus, although the failure of the Marine Corps to properly process plaintiff's interservice transfer request was mishandled, plaintiff's release was not thereby rendered illegal, since the service was not obligated to retain plaintiff on active duty until the request was finally approved or disapproved.

Armed Services ⇐ 15

Military pay; administrative discretion; active duty, place on; reserve components.

[2] It rests within the discretion of the particular Armed Service whether to place a reserve officer on active duty.

Armed Services ⇐ 15

Military pay; administrative discretion; transfer from one service to another.

[3] The transfer of a reserve officer from one Armed Service to another lies within the sound discretion of the Service Secretaries involved and the Secretary of Defense.

Armed Services ⇐ 15

Military pay; Court of Claims jurisdiction; administrative or executive decision; review of by court.

[4] For this court to order a branch of the military service to accept plaintiff as an active-duty reserve officer would be to substitute its judgment for the discretion plainly lodged in that service and would be wholly inappropriate.

Armed Services ⇐ 7

Military pay; promotions; courts, jurisdiction.

[5] The federal courts are not in the promotion business and the backdating of plaintiff's promotion to captain is beyond the power of this court to grant. This is so notwithstanding the fact that the Board for Correction of Military Records found it was an injustice and unfair to plaintiff for him to have been previously considered for promotion with certain derogatory material in his records, and notwithstanding the fact that plaintiff was immediately selected for promotion once that material was removed. The promotion of an officer is a discretionary matter dependent on the particular circumstances and needs of the service.

Armed Services ⇐ 7

Military pay; administrative remedies; exhaustion of, when necessary.

[6] Where plaintiff did not specifically request the Board for Correction of Military Records to correct his medical records or to direct a reevaluation thereof in proceedings before the Board seeking removal from his records of all material regarding his nonjudicial punishment and the adverse fitness report, the court will not normally entertain such request for relief.

Armed Services ⇐ 7

577-565—75——48

Per Curiam

Military pay; allowances; per diem allowance; temporary duty.

[7] Where the Marine Corps transferred plaintiff from his permanent duty station in Beaufort, South Carolina, "by service records" to a naval hospital at Charleston, South Carolina where he was hospitalized, and he was subsequently transferred to a naval hospital at Philadelphia, Pennsylanvia and ultimately to the Marine Barracks in Philadelphia "for duty awaiting appearance before the Physical Evaluation Board," absent evidence that the Marine Corps at any time intended Philadelphia to be plaintiff's permanent duty station, Charleston was such station, Philadelphia was a temporary duty station, and plaintiff was entitled to receive a per diem allowance during his stay in Philadelphia. The fact that the duty ultimately was of a prolonged duration is not decisive of what the service intended when it issued its orders to plaintiff.

Armed Services ⇐ 13.3(2)

Interest; claims against the United States, when allowable.

[8] Under 28 U.S.C. § 2516, interest on a claim against the United States is allowed in a judgment of the Court of Claims only where such right is expressly given under a contract or statute.

United States ⇐ 110

C. Valentine Bates, attorney of record for plaintiff. *Jones, Bates & DeCarlis*, of counsel.

Stephen Schachman, with whom was *Assistant Attorney General Carla A. Hills*, for defendant.

Before NICHOLS, KUNZIG, and BENNETT, *Judges*.

PER CURIAM: This case comes before the court on plaintiff's exceptions to the opinion, findings of fact,* and conclusion of law filed, July 22, 1974, by Trial Judge Hal D. Cooper pursuant to Rule 134(h). Upon consideration thereof, together with the briefs of counsel (oral argument having been waived) the court agrees with the trial judge's opinion as hereinafter set forth. We do not wish to be understood, and do not understand the trial judge as holding, that Correction Boards, under 10 U.S.C. § 1552(a), lack authority to grant backdated promotions in appropriate cases. The court affirms and adopts the said opinion and findings as the basis for its judgment in this case. Therefore, the court

*Whereas the court adopts the trial judge's separate findings of fact, which are set forth in his report filed July 22, 1974, they are not printed herein since such facts as are necessary to the decision are contained in his opinion.

concludes that the plaintiff is entitled to recover on his claim for per diem, in the sum of $2,826, and judgment is entered for plaintiff in that sum. In other respects the plaintiff is not entitled to recover and the petition is dismissed.

OPINION OF TRIAL JUDGE

COOPER, *Trial Judge:* Plaintiff, a Marine Corps reserve officer and an intensely dedicated military aviator, presents essentially two claims for relief, the first relating to his promotion, back pay, allowances, and an interservice transfer to the Air Force, while the second seeks an award for per diem accrued while he was on active duty with the Marine Corps. The Board for Correction of Naval Records granted plaintiff only partial relief on the first claim, while the per-diem claim was denied in its entirety by the Comptroller General.

Based on the record before the Board, and the evidence received at trial, it is concluded that the additional relief requested on the first claim must be denied, largely as a matter of law, but that plaintiff is entitled to a judgment for the claimed per diem.

I

Plaintiff was a tactical fighter pilot for the Marine Corps, serving from 1968 to 1971, with a tour of duty in Vietnam. Upon returning to the United States in January 1970, plaintiff submitted a request for an interservice transfer to the Air Force; however, the Marine Corps failed properly to process the transfer request, with the result that plaintiff's request never reached the Air Force. Meanwhile, plaintiff became involved in some incidents which resulted in his receiving nonjudicial punishment and, ultimately, his hospitalization for psychiatric treatment. By the time he was declared fit for duty, his obligated 3 years of duty had been completed and he was released on February 1, 1971.

Throughout 1970, and up to the present, plaintiff has maintained that his request for an interservice transfer resulted in a broad pattern of discrimination against him which caused him to suffer a nervous breakdown and which has destroyed his desired career as a military aviator.

Although Marine Corps regulations plainly required each transfer request to be processed through channels to the Sec-

retary of the Navy and then to the Secretary of the Air Force, plaintiff's request progressed only to Marine Corps Headquarters where it was disapproved and placed in his records. Even after plaintiff obtained the aid of congressional inquiries regarding the matter, the Marine Corps did not properly forward the request to the Secretary of the Navy. When, subsequent to his release, plaintiff was finally able to have his request reviewed by the Secretary of the Navy, it was too late to have it considered on its merits because he was no longer on active duty. It is clear that the failure of the Marine Corps properly to process the transfer request effectively negatived plaintiff's right to have the transfer considered on its merits.

In May 1971, plaintiff sought relief from the Board for Correction of Naval Records, asking, *inter alia*, that an adverse fitness report he had received be removed from his records; that his nonjudicial punishment be reviewed and removed from his records; that he be promoted to captain, with a date of rank commensurate with his peers; and that the Board aid him in his request for a transfer. While his request for relief was pending before the Board, he was passed over for promotion a second time and was involuntarily discharged.

On February 26, 1973, the Board, relying on a medical opinion that plaintiff's actions were reasonably attributable to a psychotic condition, directed removal from his records of all material regarding the nonjudicial punishment and the adverse fitness report. The Board further directed that his records should be corrected to show that he was not previously considered for promotion, so that he could be considered for promotion in 1973. The Board declined, on jurisdictional grounds, to take any action on his transfer request. Thereafter, plaintiff's discharge was canceled, he was reinstated in the Marine Corps Reserve, and, in 1973, he was selected for promotion to captain.

Believing that he has received less than all of the relief to which he is entitled, plaintiff asks this court (1) to set aside his release from active duty, (2) to award him a date of rank of captain commensurate with his peer group, (3) to grant him full pay and allowances of an active-duty officer,

from February 1, 1971, (4) to order his appointment as an active-duty reserve officer in the Air Force for a tour of duty of not less than 3 years, and (5) to direct the Naval Bureau of Medicine and Surgery to reevaluate the diagnosis that he was suffering from delusions of discrimination and was paranoid.

With respect to his release from active duty, plaintiff maintains that it should be declared null and void because of the procedural defects in the Marine Corps' handling of his interservice transfer request. While it is clear that there were such defects, that is no basis on which to give plaintiff the requested relief. Plaintiff incorrectly equates his undoubted right to request an interservice transfer to an obligation by the Marine Corps to retain him on active duty until that request has been finally approved or disapproved. In fact, no such obligation exists. Plaintiff's tour of duty was not in any way related, or otherwise contingent on, the proper processing of the transfer request. To the contrary, reserve officers like plaintiff can, under 10 U.S.C. § 681(a), be released from active duty at any time [1] and the conditions and circumstances governing that release rest within the sound discretion of the service. *Denton* v. *United States*, 204 Ct. Cl. 188 (1974); *Mercereau* v. *United States*, 155 Ct. Cl. 157, 158 (1961).

Moreover, the evidence overwhelmingly compels the conclusion that even had the transfer request been properly processed, it would have been disapproved by the Air Force, Hence, the failure properly to process the request, while inexcusable, must be viewed as harmless error.

There being nothing improper in his release from active duty, it follows that plaintiff's claim for back pay and allowances for the period subsequent to his release must also be denied.

What has been said also bears on plaintiff's request that this court order plaintiff's appointment as an active-duty officer in the Air Force. It is well settled that it rests within the discretion of the particular armed service whether to

[1] 10 U.S.C. § 681(a) (1970) provides, in pertinent part, as follows:
"681. Reserves: release from active duty
"(a). Except as otherwise provided in this title, the Secretary concerned may at any time release a Reserve under his jurisdiction from active duty."

place a reserve officer on active duty. 10 U.S.C. § 672(d) (1964); *DeBow* v. *United States*, 193 Ct. Cl. 499, 504, 434 F. 2d 1333, 1336 (1970), *cert. denied*, 404 U.S. 846 (1971); *Anthony* v. *United States*, 179 Ct. Cl. 923 (1967); *Merriott* v. *United States*, 163 Ct. Cl. 261, 264 (1963), *cert. denied*, 379 U.S. 838 (1964). It is equally clear that the transfer of an individual from one service to another lies within the sound discretion of the service secretaries involved and the Secretary of Defense. For this court to order the Air Force to accept plaintiff as an active-duty reserve officer would be to substitute its judgment for the discretion plainly lodged in that service and would be wholly inappropriate. *Anthony* v. *United States*, *supra; cf. Orloff* v. *Willoughby*, 345 U.S. 83 (1953).

With respect to plaintiff's request that his promotion to captain be backdated to that of his peers, the same problem exists. The federal courts are not in the promotion business and the relief which plaintiff here seeks—i.e., the backdating of his promotion—is beyond the power of this court to grant. *Brenner* v. *United States*, 202 Ct. Cl. 678 (1973), *cert. denied*, 419 U.S. 831 (1974); *Muldonian* v. *United States*, 193 Ct. Cl. 99, 432 F. 2d 443 (1970); *Clinton* v. *United States*, 191 Ct. Cl. 604, 423 F. 2d 1367 (1970). This is so notwithstanding the fact the Board found it was an injustice and unfair to plaintiff for him to have been previously considered for promotion with the derogatory material in his records, and notwithstanding the fact plaintiff was immediately selected for promotion once that material was removed. The difficulty is simply that the promotion of an officer is a discretionary matter dependent on the particular circumstances and needs of the service. There is no basis from which it may be concluded that the circumstances and needs of the Marine Corps, in 1973, were the same as they were in 1971 and 1972, or that the discretion to promote would, in fact, have been exercised favorably to plaintiff in either of those two years. *Clinton*, *supra*.

Finally, plaintiff asks this court to find that he was discriminated against by the Marine Corps and to order a reevaluation of the diagnosis of "paranoid state" and "delusions" in light of that finding. These charges of discrimina-

tion were presented to the Board, but in the context of seeking removal of the NJP and the unsatisfactory fitness report from his records. Plaintiff did not ask the Board specifically to correct his medical records or to direct a reevaluation thereof. Having failed to request that relief from the Board, this court will normally not entertain it here. *Keef* v. *United States*, 185 Ct. Cl. 454, 469 (1968).

However, it appears that there is no basis on which to grant the relief requested, in any event. Plaintiff's argument is premised on the assumption that the diagnosis of paranoid state rested either solely or in important part on his allegations of discrimination and that, therefore, if, in fact, the discrimination existed, the diagnosis must have been incorrect. Aside from the fact that the conclusion does not necessarily flow from the premise, the difficulty immediately confronted by this argument is that plaintiff did not place in evidence his medical history [2] which would have indicated the basis for the diagnosis. Without that, there is no more reason to assume that the diagnosis was based solely on plaintiff's allegations of discrimination than there is to assume the diagnosis was based on a thoroughgoing, careful psychiatric examination. If anything, the presumed competence and integrity of the Navy doctors treating him would support the latter conclusion. Moreover, the Board had available to it the opinion of the Bureau of Medicine and Surgery which reviewed plaintiff's medical history, concurred in the diagnosis of paranoid state, and concluded that plaintiff's judgment had been temporarily impaired by that psychiatric illness. In light of that opinion, and in the absence of any evidence whatever that there was any error in the diagnosis, there is no basis for directing a reevaluation of plaintiff's medical records.[3]

Nor is the evidence of discrimination adduced at trial of such a nature as to demonstrate a compelling need for a re-

[2] Specifically, the Medical Board Report #J–600517 from the U.S. Naval Hospital, Philadelphia, Pennsylvania, is not included in the record before the court.

[3] It should be noted in this connection that plaintiff has, in a sense, received a benefit from that diagnosis. Relying on that diagnosis, the Board ordered the derogatory material expunged from his record. Plaintiff's present attempt to set aside the medical diagnosis would, in effect, undercut the very basis on which the Board gave him relief and would, presumably, result in restoration of at least the adverse fitness report to his records.

evaluation. Plainly, mistakes were made by the Marine Corps and, in the case of plaintiff's transfer request, regulations were ignored. With respect to the POV incident (findings 9, 10), plaintiff was treated outright unfairly and in a manner that was directly contrary to the treatment accorded others. However, when viewed as a whole, the claimed broad pattern of discrimination simply does not emerge. What does emerge is a picture of plaintiff experiencing some emotional difficulties, largely due to personal problems he was then having, and the occurrence of a series of unrelated incidents which, when taken with plaintiff's intense desire to fly and his frustration at being assigned to a nonflying position, deepened his emotional problems and resulted in his being less than patient in dealing with those incidents. Plaintiff's problems were compounded by the Marine Corps being less than understanding of plaintiff's frustrations, its refusal to admit any error or mistake, and its inflexibility in its demanded standard of conduct without regard either to plaintiff's emotional state or the impact its errors and mistakes were having on plaintiff.

In summary, plaintiff has failed to show the Board acted arbitrarily or capriciously in affording plaintiff the relief it did, or that he is entitled to any additional relief that is within the power of this court to grant.

II

Plaintiff's claim for per diem arises out of his hospitalization at Charleston, South Carolina, on May 29, 1970; his transfer to Philadelphia on June 13, 1970; and the Marine Corps' order of June 18, 1970, transferring him "by service records" to Charleston. Plaintiff maintains that, having been transferred by service records only so far as Charleston, his duty in Philadelphia, from the date of his release from the hospital on September 25, 1970, to his release from active duty on February 1, 1971, was temporary duty for which he is entitled to receive per diem.

The Marine Corps initially gave plaintiff an advance per-diem payment; then refused to give him any more; then recovered the advance without determining whether he was on temporary duty and entitled to per diem; and, finally,

after plaintiff had been released from active duty, the Comptroller General declared that a mistake had been made, that the Marine Corps had *intended* Philadelphia to be plaintiff's permanent station, and that plaintiff was entitled to no per diem.

The only objective evidence in the record establishes that plaintiff's permanent duty station was, by the order of June 18, 1970, changed from Beaufort to Charleston, and no farther. There is no evidence the Marine Corps at any time intended Philadelphia to be plaintiff's permanent duty station. Even defendant does not contend that the hospital in Philadelphia was intended to be plaintiff's permanent duty station and the order of September 25, 1970, transferring plaintiff from the hospital in Philadelphia to the Marine Barracks in Philadelphia "for duty awaiting appearance before the Physical Evaluation Board," clearly indicates the temporary nature of the duty plaintiff was to perform thereafter. The mere fact that duty ultimately turned out to be of a prolonged duration is not decisive of what the Marine Corps intended when it issued its orders to plaintiff. *Cf. Trifunovich* v. *United States*, 196 Ct. Cl. 301, 311 (1971).

Nor can the contention that the Marine Corps made a mistake be given any weight. If a mistake was made, and there is nothing in the record to support the speculation by the Comptroller General that such is the case, it was defendant's mistake, not plaintiff's. Plaintiff had no control over his duty status; defendant did. Defendant had ample opportunity to indicate its intentions and to correct any mistakes it may have made with respect to plaintiff's duty status, but when squarely presented with the question, it declined to do so, apparently electing to deny plaintiff per diem while leaving his status undetermined.

Under the circumstances, it is concluded that Charleston was plaintiff's permanent duty station, that Philadelphia was a temporary duty station, and that plaintiff is entitled to receive per diem as claimed.

Plaintiff claims per diem at $25 per day from September 25, 1970 to February 1, 1971, for a total of $3,225,[4] less

[4] Plaintiff's claim for interest is barred by statute. 28 U.S.C. § 2516(a) (1964). *Trifunovich* v. *United States*, *supra* at 304 n.1.

a credit of $399 paid to him on February 1, 1973. Defendant does not contest these amounts. Accordingly, plaintiff is entitled to judgment in the amount of $2,826.

CONCLUSION OF LAW

Based upon the findings of fact and the foregoing opinion, which are adopted by the court and made a part of the judgment herein, the court concludes as a matter of law that plaintiff is entitled to recover, and judgment is entered for plaintiff in the sum of $2,826.

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514 F. 2d 1020

SUN OIL COMPANY AND THE SUPERIOR OIL COMPANY v. THE UNITED STATES; MARATHON OIL COMPANY, INTERVENOR

[No. 806–71. Decided April 16, 1975]

ON DEFENDANT'S REQUEST FOR REVIEW OF TRIAL JUDGE'S ORDER DENYING CLAIM OF EXECUTIVE PRIVILEGE AND FORMER PRESIDENT RICHARD M. NIXON'S MOTION FOR A PROTECTIVE ORDER AGAINST DISCOVERY OF DOCUMENTS

Privilege; executive or presidential privilege; discovery and inspection; production of documents; *in camera* inspection.—In their petitions, plaintiffs allege that defendant breached their contract (lease of an area off the California coast for exploration and drilling for oil and gas) or took their property by its delay in permitting, and refusal to permit, installation of an oil drilling platform essential to operation of the lease which expressly granted them the right to erect in the said area platforms, pipelines, etc. Plaintiffs seek to ascertain through the discovery process who made the decision to deny their application to proceed with the platform and why it was denied. Four documents of former President Nixon are now contested by his claim of absolute privilege. Defendant United States has withdrawn its initial claim of privilege respecting the said documents but supports Mr. Nixon's claim of privilege, asserting that there is a presumptive privilege for the confidentiality of presidential communications, that it is fundamental in the operation of Government and inextricably rooted in logic and the separation of powers under the Constitution, and cannot disappear because a President leaves office, citing in support *United States* v. *Nixon*, 418 U.S. 683 (1974). However, defendant says that while the presumptive privilege of confidentiality extends to a former President, it is not inviolate, and that it is proper for the court to undertake a

Syllabus

balancing process to determine the competing rights. It is *held* that the claim of privilege asserted by a former President, whether that claim be called executive or presidential privilege, cannot be absolute, and that the balancing process is applicable to an incumbent President's claim of privilege in a civil case, as well as in a criminal case as held in *United States* v. *Nixon*, *supra*, and that this applies as well to a former President. The court *assumes*, without deciding, that the former President has presumptive privilege, no greater than the incumbent President, but *finds* upon this assumption that plaintiffs have made a sufficient showing of need to overcome the presumption and to justify *in camera* inspection of the four contested documents. Such a showing as has been made here would not be possible in every case and thus would not always justify the assumption the court can and does make here. The court *orders* remand of the case to the trial division for *in camera* inspection of the four contested documents with appropriate instructions to the trial judge. The motion filed November 7, 1974 for a protective order against discovery of said documents is denied.

Privilege; executive or presidential privilege; discovery and inspection.

[1] An incumbent President's right of executive privilege is not absolute in a criminal case where there is a showing of sufficient need for access to disputed documents. *United States* v. *Nixon*, 418 U.S. 683 (1974). The same sort of balancing process is applicable to an incumbent President's claim of privilege in a civil case, albeit the burden on the litigant seeking discovery might be heavier. *A fortiori*, the claim of privilege asserted by a former President, whether that claim be called executive or presidential privilege, cannot be absolute. He is entitled to no greater rights than the incumbent President in this regard.

United States ⇐ 26

Privilege; production of documents; presidential privilege.

[2] Assuming, without deciding, that there is a presumptive privilege a former President can invoke, where a demonstrated need for documents sought is clearly sufficient, on balance, to override a claim of privilege, the documents must be produced.

United States ⇐ 26

Pleading and practice; discovery and inspection; production of documents; *in camera* inspection.

[3] Confidentiality is not diminished by *in camera* inspection of disputed documents.

Courts ⇐ 460

Pleading and practice; discovery and inspection; subpoena against President.

[4] Since an incumbent President is not absolutely immune from court process, a former President can claim no greater immunity.

United States ⇐ 26

Per Curiam

Pleading and practice; discovery and inspection; production of documents; scope of discovery; need for documents; privilege.

[5] Need for documents sought on discovery may be illustrated by a showing of relevance to the subject matter in suit and that they appear reasonably calculated to lead to the discovery of admissible evidence. On balance, this may, in the court's discretion, overcome a presumption of privilege. (See Rules 71(b)(1) and 74(c)).

Courts ⟸ 460

Edgar H. Brenner, attorney of record, for Plaintiff The Superior Oil Company. *Abe Krash*, *James A. Dobkin*, *David Bonderman*, *Arnold & Porter*, of counsel.

Theodore L. Garrett, for Plaintiff Sun Oil Company. *Henry P. Sailer*, attorney of record. *Covington & Burling*, of counsel.

Richard A. Baenen, attorney of record for Intervenor Marathon Oil Company. *Patricia Brown*, *Wilkinson*, *Cragun & Barker*, of counsel.

Myles E. Flint, with whom was *Assistant Attorney General Wallace H. Johnson*, for defendant. *Andrew F. Walch*, of counsel.

Herbert J. Miller, Jr., for Richard M. Nixon. *Thomas D. Rowe, Jr.*, *William H. Jeffress, Jr.*, *R. Stan Mortenson*, *Miller, Cassidy, Larroca & Lewin*, of counsel.

Before COWEN, *Chief Judge*, DAVIS, SKELTON, NICHOLS, and BENNETT, *Judges*.

PER CURIAM: The question here at issue is whether or not a former President of the United States, a private citizen, can maintain absolute privilege as to certain White House papers sought on motion for discovery by plaintiffs in a civil suit. The question does not appear to have been finally decided heretofore by a federal court.

Plaintiffs are oil companies that have leased from the United States an area off the coast of California, in the Santa Barbara channel, for exploration and drilling for oil and gas, pursuant to the Outer Continental Shelf Lands Act, 67 Stat. 462 (1953). Plaintiffs allege that their lease, OCS P–0240, expressly grants to them the right to erect in the leased area all platforms, pipelines and other works and structures neces-

sary to the full enjoyment of the rights granted by the lease for which they have paid defendant $38,380,032 and have, in addition, expended over $70 million in exercise of their rights thereunder. Their principal claim is that defendant has both breached the contract and has taken their property rights under the lease by its delay in permitting, and refusal to permit, installation of Platform Henry, an oil drilling platform essential to operation of the lease. Plaintiffs seek to ascertain through the discovery process who made the decision to deny their application to proceed with Platform Henry, and why it was denied. Four documents are now contested by the claim of privilege. Some 30 other documents from the Executive Department have been provided to plaintiffs either voluntarily or by court order after *in camera* inspection by the trial judge.

On November 26, 1974, the former President's present counsel moved to file with the court a document, captioned Formal Claim of Presidential Privilege, personally signed by Richard M. Nixon.[1] We allowed the motion. The claim states in full:

> I, Richard M. Nixon, have reviewed the items identified in Part D of the appendix to the affidavit of J. Fred Buzhardt dated February 26, 1974, and submitted to this Court. I hereby represent to the Court that these materials relate to the period of my term as President of the United States, constitute communications to the President from his advisors or communications among his White House advisors concerning contemplated Presidential action, and are within the constitutional privilege of the President to refuse to disclose confidential information. Thus, I must respectfully claim privilege with regard to these materials.

[1] A claim of executive privilege was filed by counsel to the President, J. Fred Buzhardt, after consultation with Mr. Nixon while he was still President. The claim was rejected by the trial judge as not sustainable under the doctrine of *United States* v. *Reynolds*, 345 U.S. 1, 7–8 (1953), and other authorities, because not claimed personally by the head of the Executive Department. Mr. Nixon had left office when this ruling was reviewed by this court on appeal. The court, on November 7, 1974, 205 Ct. Cl. 856, entered an order requiring him to assert the privilege personally if he wished to pursue it, defendant having elected to withdraw any claim of privilege in its own right.

Part D of the Buzhardt affidavit referred to identifies the four documents, as follows:

> D. Presidential documents which include briefing papers and memoranda prepared for the President for his use in meetings and in decision making regarding whether to allow drilling.
>
> (1) 3/27/69 Letter, Russell E. Train to the President, containing recommendation for action to be taken in connection with the oil spill.
>
> (2) 4/ 9/70 Memorandum, Russell E. Train, Robert Cahn and Gordon J. MacDonald, (CEQ) to the President, stating the CEQ's views on the position of the Secretary of the Interior.
>
> (3) 4/13/70 Memorandum, John C. Whitaker to William T. Pecora discusses proposed Presidential statement.
>
> (4) 4/15/70 Memorandum, W. T. Pecora to John Whitaker: Paragraph on drilling on the Dos Cuadras Structure. (Draft paragraph for inclusion in Presidential statement.)

Mr. Nixon suggests that a distinction may be drawn between traditional "executive privilege," which could not be asserted by a private person because it relates to military, State, and national security matters, on the one hand, and on the other, absolute "presidential privilege" which may be asserted by a former President as to other documents generated during his Administration. The Government, it is said, represented by an incumbent President, has a primary interest in the former. Also, it is argued, there is a big difference between civil and criminal cases as to privilege because it can be invoked in the latter only at the price of letting defendant go free, and because a criminal defendant will frequently have constitutional claims for the production of privileged material which would be infrequent in civil cases. It is argued that any breakdown in privilege would encourage interminable civil litigation because the actions of a President in today's society have such a direct bearing on happenings in the market place. Any balancing of competing claims on a motion for discovery under such circumstances would violate the privilege and render it meaningless under

this view. The public interest in protecting confidentiality of advice given to a President and the potential chill on free expression of opinions by aides, as well as the right of personal privacy, outweigh any possible interest a plaintiff might have in discovery of presidential papers in a civil case, according to the former President. It is pointed out that if only an incumbent President can claim privilege, a former President could be put at great disadvantage because his successor might be politically hostile or have other conflicting interests and, knowing of this possibility, a President's aides, fearing potential disclosure of their recommendations soon after he leaves office, would not in some cases give a President the candid advice he needs for proper, objective discharge of his decision-making powers and responsibilities under the Constitution. Finally, Mr. Nixon says that plaintiffs have, in any event, made no showing of necessity sufficient to support this discovery, even assuming it is possible to overcome the privilege claimed. The foregoing are Mr. Nixon's principal arguments, and in support of his position he relies principally upon *United States* v. *Nixon*, 418 U.S. 683, 94 S. Ct. 3090 (1974); *United States* v. *Reynolds*, 345 U.S. 1 (1953); *Senate Select Committee* v. *Nixon*, 498 F. 2d 725, 729–30 (D.C. Cir. 1974); *Nixon* v. *Sirica*, 487 F. 2d 700 (D.C. Cir. 1973); *Committee for Nuclear Responsibility, Inc.* v. *Seaborg*, 463 F. 2d 788, 794 (D.C. Cir. 1971); *Kaiser Alum. & Chem. Corp.* v. *United States*, 141 Ct. Cl. 38, 45, 157 F. Supp. 939, 944 (1958); and *United States* v. *Burr*, 25 F. Cas. 187, 192 (No. 14,694) (C.C.D. Va. 1807).

Defendant United States has withdrawn its initial claim of privilege respecting the contested documents but supports Mr. Nixon's claim of privilege because "it has a strong institutional interest in the protection to be afforded Presidential materials once the President leaves office." Defendant states that there is a presumptive privilege for the confidentiality of presidential communications, that it is fundamental to the operation of Government and inextricably rooted in logic and the separation of powers under the Constitution, and cannot simply disappear overnight because a

President leaves office. Defendant believes this position to be in accord with *United States* v. *Nixon*, *supra*.

Defendant also refers to the so-called Truman precedent. The Un-American Activities Committee of the United States House of Representatives subpoenaed former President Harry S. Truman to testify before it in 1953. Mr. Truman declined to testify, stating that he was following "a long line of precedents" of presidential refusals to respond to congressional demands for information, and that the doctrine of separation of powers has validity as to a former President. The Committee did not press the issue and it never reached a court.

Defendant, however, takes the position that while the presumptive privilege of confidentiality extends to a former President, it is not inviolate, and that it is proper for the court to undertake a balancing process to determine the competing rights. Defendant admits that if plaintiffs are able to show that the documents are relevant to this litigation and that plaintiffs have demonstrated a proper need for them to establish facts, the court must consider whether such a showing overcomes the need for confidentiality embraced within the presumptive privilege afforded the documents. No sensitive national security matters are involved. Thus, on the extent of the privilege, defendant disagrees with Mr. Nixon who holds that it is absolute and beyond the court's inquiry.

All contestants here are agreed that since the papers sought are in possession of defendant, the United States, as to the issue of whether they should be produced by discovery, the question of their ownership is irrelevant.

Finally, we turn to a statement of plaintiffs' contentions, which will also be summarized. At the outset, plaintiffs reject the notion that there can be any viable distinction between executive privilege and presidential privilege. They are said to be of the same cloth, for the public benefit, and assertible only by an incumbent President. *United States* v. *Reynolds*, *supra*, 345 U.S. at 7–8; *Nixon* v. *Sirica*, *supra*, 487 F. 2d at 717; *Kaiser Alum. & Chem. Corp.* v. *United States*, *supra*, 141 Ct. Cl. at 45, 157 F. Supp. at 944; *Senate Select Committee* v. *Nixon*, *supra*, 498 F. 2d at 729. Further, there is

no absolute privilege; the courts do have authority to review assertions of presumptive executive privilege, and it is their responsibility, and not that of a President, to say what the law is. *United States* v. *Nixon*, *supra*; *Nixon* v. *Sirica*, *supra*; *Committee for Nuclear Responsibility, Inc.* v. *Seaborg*, *supra*. As to the idea that frank communication between presidential aides and the President will be destroyed and thus a recognized constitutional protection of confidentiality will be debased if discovery is allowed, plaintiffs say that any incumbent President has an interest in protecting such communications from unwarranted disclosure, because he too will leave office eventually; that public officials are presumed to act properly, and that even under Mr. Nixon's absolutist views of privilege, presidential aides could never be sure that their President would not release their comments at some point in time anyway. It is also pointed out that if claims of executive privilege are not absolute under the Freedom of Information Act, 5 U.S.C. § 552 *et seq.*, *Environmental Protection Agency* v. *Mink*, 410 U.S. 73 (1973), *Soucie* v. *David*, 448 F. 2d 1067 (D.C. Cir. 1971), where a requesting party need not show particular need for the information, *a fortiori*, then the same result must follow in civil litigation where such need is demonstrated. *Center on Corporate Responsibility, Inc.* v. *Shultz*, 368 F. Supp. 863 (D.D.C. 1973); *Black* v. *Sheraton Corp.* 371 F. Supp. 97 (D.D.C. 1974). Plaintiffs maintain that the proper procedure in such a case is for the court to balance the private litigant's need for the documents against the Government's or the public's interest in the privilege asserted. *United States* v. *Reynolds*, *supra*, 345 U.S. at 8. As to the latter, plaintiffs point out that the claim of privilege here shows no compelling reasons against disclosure other than alleged rightness of the view of absolute protection of confidentiality against disclosure asserted to reside in a former President's papers in a civil case. Since the Supreme Court, in *United States* v. *Nixon*, *supra*, held that a generalized claim of public interest in confidentiality in nonmilitary or State secrets is insufficient, and rejected the idea that there can be any absolute privilege in a President in a criminal case, it follows logically, in plaintiffs' view, that the same result should follow in a civil case. The Supreme Court, of course,

explicitly refrained from stating this latter view, as it was unnecessary to do so to reach a decision in that particular case.

It has been necessary to set forth the contentions of the parties at length to show that they have raised a serious issue with constitutional dimensions of some magnitude. We have carefully examined all the cases which establish that a claim of executive privilege will give way to a showing of sufficient need by a litigant in a civil case. Those cases, of course, involved various claims of privilege by the heads of executive agencies rather than by the Chief Executive. In *United States* v. *Nixon*, *supra*, it was held that the claim of executive privilege has constitutional significance where the incumbent President is involved. Yet, the constitutional overtones did not preclude the Supreme Court from finding that the incumbent President's right of executive privilege is not absolute in a criminal case. We think that the same sort of balancing process would be applicable to an incumbent President's claim of privilege in a civil case, albeit the burden on the litigant seeking discovery might be heavier. *A fortiori*, then, we believe that the claim of privilege asserted by a former President, whether that claim be called executive or presidential privilege, cannot be absolute. We so hold. He should be entitled to no greater rights than the incumbent President in this regard.

If there is no absolute privilege in a former President to resist discovery, and no court has ever recognized such a privilege, although counsel have advanced several cogent reasons to recognize it in some manner, does he have presumptive privilege in a civil case such as an incumbent President would enjoy? We do not believe that it is necessary in this case to decide whether there is presumptive privilege that follows a President from the White House into private life. Giving the benefit of every doubt to the former President by assuming, without deciding, that there is a presumptive privilege he can invoke, the rule has long been established that where a demonstrated need for documents sought is clearly sufficient, on balance, to override a claim of privilege, the documents must be produced. *United States* v. *Reynolds*, *supra*, 345 U.S. at 11; *Nixon* v. *Sirica*, *supra*, 487 F. 2d at 713. This follows logically from the fact that since executive

privilege is merely presumptive, the presumption may be overcome on a proper showing.

A court concludes whether or not there is enforceable privilege in a given case by examining the motion papers, or affidavits of the parties concerning a claim of privilege, or, in some cases, by *in camera* inspection of the disputed documents. Confidentiality is not diminished by *in camera* inspection. *United States* v. *Nixon*, *supra*. Since a President is not absolutely immune from court process, a former President can claim no greater immunity, and the court must determine whether his claim of privilege, assuming his right to assert it, is overcome by a plaintiff's need in litigation. Have plaintiffs shown the requisite need here? We think so.

Plaintiffs claim a breach of contract and a taking. They say that as a matter of law only the Secretary of the Interior could, for environmental reasons only, have refused permission to build Platform Henry for development of their lease. On September 21, 1971, over a year after they had filed their application to install the platform, that application was denied, purportedly by the Secretary, for unspecified environmental reasons. On November 23, 1972, more than a year after the denial, and after commencement of this litigation, the Secretary rendered a formal "decision" based on environmental grounds. Another year passed, and on September 25, 1973, at a news conference, President Nixon is shown to have stated that the Secretary, the official specified in the contract and in the statute, *supra*, to take such action, did not in fact make the decision to deny plaintiffs' application, but that the President made it and the Secretary merely announced it.

Prior to the September 21, 1971 denial of plaintiffs' application, there was a flurry of activity by presidential subordinates exchanging memoranda concerning the proper action to be taken and the various factors to be considered in reaching a decision on the application, including the potential political impact. The four additional documents now sought, as described above in the Buzhardt affidavit, consist of two memos between presidential aides and two from his aides to the President, allegedly refining still further the options believed open for ultimate presidential consideration and decision. We have, of course, not seen the documents.

We do not know whether, as plaintiffs hope, they will show who refused the application for Platform Henry, or why it was refused. But, it is reasonably clear that they have a need to show the foregoing. These papers might well lead to the discovery of admissible evidence and are suggestively relevant to the subject matter of this action. Plaintiffs seem to believe that they will ultimately be able to prove that the President or someone on his White House staff turned their application down and did so for impermissible, extraneous, political, or other reasons which they think, if shown, would make their case. They are entitled to try to show this, and a generalized claim of privilege, assuming a former President can assert it, cannot prevail against the plaintiffs' need to develop the facts by resort to discovery.

We see no need to go further. The issue is narrower than the parties would have us believe. It is not necessary now to resolve finally the constitutional issue of how much privilege, if any, a former President has. There has been enough delay. We order the case remanded to the trial division for *in camera* inspection of the four contested documents by the trial judge who has this matter on his docket. We charge him to assume the responsibility (heavier because presidential papers are involved) of examining the documents for the purpose of excising any parts thereof that do not meet the test set forth in *United States* v. *Nixon*, *supra*, other applicable precedents and authorities, and the Rules of the United States Court of Claims. In his discretion he may seek the aid of counsel in the case for *in camera* consideration of the validity of particular excisions. If he does so, he should consult all counsel. In short, we assume, without deciding, that the former President has presumptive privilege, no greater than the incumbent, but find upon this assumption that plaintiffs have made a sufficient showing of need to overcome the presumption and to justify *in camera* inspection of the four contested documents. Such a showing as has been made here would not be possible in every case and thus would not always justify the assumption we can and do make here. In such a case it might be necessary to decide the broader issue of whether a former President has the right to claim an executive or "presidential" privilege,

but it is inappropriate to decide an issue of such magnitude when the dispute can be resolved on narrower grounds available to us here.[2]

The trial judge entered an order on May 16, 1974, ruling that the claim of executive privilege made by the President's counsel was insufficient and that it must be made by the President personally or else the contested documents would have to be produced for inspection by plaintiffs. Defendant requested review but has since rendered the request moot by withdrawing its claim of executive privilege. Defendant admits that it would not be against the public interest to disclose the documents if plaintiffs can show to the court's satisfaction that they are needed to establish facts relevant to the litigation. In such event, defendant agrees, it is proper for the court to consider whether such a showing overcomes the need for confidentiality embraced within the rule of presumptive privilege afforded presidential papers as an encouragement to candor.

For the reasons, and to the extent, set forth in the order above directing *in camera* inspection, the motion filed November 7, 1974, for a protective order against discovery of the four contested documents of former President Richard M. Nixon is denied.

NICHOLS, *Judge*, concurring:

I concur in the result. The court proposes a course of action that is rational in the circumstances, and fair to both sides. I cannot join in all the reasoning but come to the same end by another route.

The theory is as I understand it as follows: First, we reject Mr. Nixon's claim of absolute privilege. Whether his claim can be treated as one for a qualified privilege, or rejected entirely, is considered as moot because the same action should be taken in either case. If the claim is valid for qualified privilege, we checkmate it with a holding of "necessity". In either case, our duty is the same. Even where no privilege

[2] Because of the narrow grounds upon which we dispose of the present matter, we have denied, by separate order, the motions of Mr. Nixon's counsel for leave to file supplemental materials on other questions contained in briefs to other courts.

is involved, we must safeguard important and sensitive Government papers against irresponsible fishing expeditions. The examination of the disputed documents in chambers in presence of counsel on all three sides, and excision of irrelevant and prejudicial material, would be a fair and reasonable measure, qualified privilege or none.

I have difficulty with the court's determination of "necessity", which I find to be premature. In the first place, it may be that the disputed documents will be found merely cumulative in their probative effect with documents already discovered. In that event, there is not "necessity". *Weiss* v. *United States*, 180 Ct. Cl. 863 (1967), 187 Ct. Cl. 1, 408 F. 2d 416 (1969). We said at 180 Ct. Cl. 870:

> * * * The privilege here is not absolute and must yield to compelling necessity. The court, through one of its judges, offered the Government the opportunity to save the privilege by opening up other means for the court to ascertain the facts it had to have. The Government endeavored to comply with this suggestion but we hold it has not succeeded in doing so. * * *

The defendant has opened up "other means" here but plaintiffs apparently believe they can prove still more if they have full discovery. It will therefore be requisite to compare the documents now in controversy with those already discovered to see what the former add. The trial judge should do this after remand to him.

Our determination of "necessity" besides being premature in the above particular, seems to me to give unintended countenance to a technique of attacking administrative decisions by impugning the motives of those who make them, that I think, we are seeing too much of in courts of law. I recognize a possibility that the four disputed documents may reveal a breach of plaintiffs' legal rights, according to any lawyer's ideas, a possibility made real by the facts recited. The court has taken care not to pronounce too much, but any determination of "necessity" implies some judgment as to substantive law. I would prefer that announcement of the legal consequences of the documents should follow and not precede a revelation of their contents. This is the ordinary order and legal pronouncements made without regard

to it are apt to come back and haunt us. I would have the trial judge determine "necessity", subject of course to review by us, after he has seen the controverted documents and knows what they will show. In *Weiss*, we determined "necessity" in course of reviewing a trial judge's decision on the same issue, without either of us seeing the documents, but neither he nor we had the light we have received since as to the rights and duties of a court in face of a qualified privilege. There may be situations still where the court must determine "necessity" without seeing the documents, but I do not think this case is one of them.

As I read *United States* v. *Nixon*, 418 U.S. 683, 94 S. Ct. 3090 (1974), the Supreme Court did not determine "necessity" *vel non* in general or as to any particular document. The instructions to the trial judge in fn. 21, 418 U.S. at 715, 94 S. Ct. at 3111, mention that he is to determine relevance and admissibility and make excisions where appropriate. It may be in the context of a criminal proceeding the non-necessity of merely cumulative material is not a factor. The other elements of "necessity" are incorporated in relevance and admissibility.

If I am wrong in the above, however, I will add I don't think we have before us, anyway, a claim of privilege by one legally qualified to make it. I agree that no ex-President can assert an absolute privilege but deny that he can assert a qualified privilege. Of course it is true that an incumbent President might wrongly refuse to claim privilege for his predecessor's papers when it should be claimed, assuming as I do that the privilege serves a useful purpose even where, as here, military or diplomatic secrets are not involved. Conversely, an ex-President may claim privilege in a distorted or one-sided manner, or not claim it when it should be claimed, if the claim is his to make. He may be more concerned with another try at the Presidency, or with his place in history, than he is with the public interest. The right to claim privilege is not really a privilege in the ordinary sense. It is a duty. The duty must devolve, if it is to be exercised in the public interest, on the person who is currently under oath to see that the laws are faithfully executed, *i.e.*, the current in-

cumbent. I would hold we have no valid claim of privilege before us.

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514 F. 2d 1041

AMAX FLY ASH CORPORATION* v. THE UNITED STATES

[No. 261-69. Decided April 16, 1975]

ON THE PROOFS

Patents; validity; infringement; obviousness; inventorship; license.— Plaintiff seeks reasonable and entire compensation for the alleged unauthorized use by defendant of the invention described and claimed in its U.S. patent No. 3,421,587 relating to fly ash and a method for controlling fires in abandoned mines by pneumatically injecting a mixture of air and fly ash down a borehole into the mine cavity. Since 1949 the Bureau of Mines has been active in mine-fire control work and by 1967 the Bureau had substantial experience in this field and had developed a number of techniques. Defendant contends that claim 1 is obvious under 35 U.S.C. § 103; that infringement has not been demonstrated because it has not been shown that fly ash of the claimed size was in fact used at Monongahela City, Pennsylvania, by defendant and because it did not employ a method which included the step of "closing and sealing the holes" as required by claim 1; that the patentees derived the invention from Malcolm Magnuson, an employee of the Bureau; and that it is entitled to a nonexclusive royalty-free right to practice the invention. The inventorship issue centers around a meeting in June 1967 between Magnuson and one of the joint patentees (an employee of plaintiff); a test attended by the two foregoing individuals and others in which, using plaintiff's equipment, fly ash was injected pneumatically down a cold borehole and a borehole directly over an underground mine fire; issuance by the Bureau of a specification calling for pneumatic injection of dry fly ash as a fire-control method; filing by plaintiff of its patent application; and, substantially later, filing by Magnuson of a patent application claiming essentially the same method as the patent in suit. It is *held* (1) that considering the state of the art in the field of fire control in abandoned mines, the level of skill in that art, the differences between the claimed method and the prior art, and the relevant secondary considerations, the process of claim 1 was not obvious within the meaning of 35 U.S.C. § 103 and that claim 1 is valid; (2) that plaintiff has sustained its burden of demonstrating infringement of

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*The above-named plaintiff substituted for Dayton Fly Ash Co., Inc., by order of April 4, 1973.

Syllabus

claim 1; (3) that in the absence of clear testimony by Magnuson as to a specific prior conception, the absence of corroboration either by any witness or by any document as to the fact of such a conception, and in view of the doubts, concerns and lack of specific information he possessed, defendant has failed to sustain its burden of proving either a prior conception by Magnuson or a communication of that conception to one of the joint inventors with whom he had had discussions; (4) that the proofs are insufficient to establish Magnuson as a coinventor; (5) that under the facts and absent any contractual relationship between plaintiff and the Government, defendant is not entitled to a nonexclusive royalty-free license to practice the invention. Plaintiff is entitled to recover reasonable and entire compensation for unauthorized use by defendant and judgment is entered to that effect. The extent of defendant's liability is to be determined in further proceedings.

Patents; patentability; obviousness; generally.

[1] Nonobviousness of a claimed process is supported where the invention, by employing materials and process steps that, to one of ordinary skill, suggested problems rather than a solution, proceeds in a direction contrary to the prior art.

Patents ⇐ 18

Patents; patentability; obviousness; delay and failure of others to produce invention.

[2] The failure of others, including those highly skilled in the pertinent art and long occupied with the subject problem, to propose the claimed process is a factor to be considered in the determination of obviousness.

Patents ⇐ 18

Patents; patentability; obviousness; generally.

[3] In determining obviousness of an invention, the reactions of those skilled in the field, once the invention was developed, are pertinent, such as in the present case the alteration by the Bureau of Mines of its fire-control projects to adopt the claimed process, extolling of the invention's virtues by Bureau employees, newspaper articles hailing the process as one having great promise, the Bureau's view that the process was new and unobvious in a patentable sense, and the Bureau's attempt through an application filed by one of its employees to obtain a patent on the process.

Patents ⇐ 18

Patents; invention; conception.

[4] To sustain the defense of derivation of invention, defendant must show that he had both a prior conception thereof and that he disclosed the conception to plaintiff. The conception must be more than the realization of a desirable result and more than a mere hope or expectation.

Patents ⇐ 264

Syllabus

Patents; invention; conception.

[5] Conception has been achieved when the inventive idea is crystallized in all of its essential attributes and becomes so clearly defined in the mind of the inventor as to be capable of being converted to reality and reduced to practice by the inventor or by ones skilled in the art.

Patents ⇐ 16

Patents; invention; conception.

[6] It is the usual rule that a claim of prior conception requires corroboration; however, the existence of corroboration is to be determined by viewing the evidence as a whole.

Patents ⇐ 62(1)

Patents; invention; conception.

[7] Once conception has occurred, the inventor may use the services and assistance of others to perfect his invention without losing his right to a patent.

Patents ⇐ 90(7)

Patents; inventorship; presumption of correctness.

[8] The inventors as named in an issued patent are presumed to be correct, and evidence to prove prior discovery must be clear and satisfactory.

Patents ⇐ 91(1, 3)

Patents; invention; conception.

[9] Conception is an act of the mind.

Patents ⇐ 16

Patents; defenses; derivation of invention; standard of proof.

[10] To sustain the defense of derivation, defendant must first show, by clear and convincing evidence, that he had a prior conception of the claimed subject matter.

Patents ⇐ 91(3)

Patents; invention; conception.

[11] It is insufficient, on the issue of prior conception, merely to show prior knowledge of the broad idea; rather, it must be shown that, in addition to the broad idea, there was a realization, in finite terms, of the means or process steps by which the desired result would be achieved.

Patents ⇐ 51(2)

Patents; invention; conception.

[12] Although the alleged inventor remarked, after being told of the use of pneumatic tank trucks to blow dry cement or dry fly ash into storage bins and after it was mentioned to him that fly ash could be blown down into a mine, that it looked like the "answer" to the problem of controlling fires in abandoned mines, since he had no experience with dry fly ash and no specific knowledge about pneumatic tankers, how they operated to aerate fly ash and their

Syllabus

injection pressures, and since he believed that dry fly ash would plug the borehole, that the injection of air into the mine might feed the fire much like a forge and that injecting fly ash under pressure would cause the fly ash to dissipate as dust, the "answer" was substantially less than a firm conception of the claimed process by which a pneumatic tanker could, when connected to a borehole, be operated to inject fly ash to extinguish a mine fire.

Patents ⇐ 16.14

Patents; invention; conception.

[13] Under the circumstances here, absence of a contemporaneous disclosure by the alleged inventor of the claimed process when it allegedly was the answer to a difficult problem, raises substantial doubts that he conceived the invention.

Patents ⇐ 91(4)

Patents; invention; conception; evidence; self-serving statement.

[14] Where the notes of one of the joint patentees indicate that he allocated the suggestion of pneumatic injection of fly ash to himself rather than to the alleged inventor with whom he had discussed the problem of fire control in abandoned mines and whose essentially contemporaneous notes offer no indication of who raised said topic, although the patentees' notes are self-serving they are entitled to some weight since they also were made essentially contemporaneously with the discussion and long before any controversy had developed as to inventorship.

Patents ⇐ 91(4)

Patents; inventorship; misjoinder or nonjoinder.

[15] Where more or less than the true inventors are named, the patent is void. However, misjoinder and nonjoinder of invention are technical defenses requiring clear and convincing evidence; a claim of coinventorship is viewed with skepticism and requires clear and convincing evidence.

Patents ⇐ 118.21

Patents; title or ownership; license; implied license.

[16] Although defendant's personnel participated in a demonstration of the subject process at a site selected by defendant, this does not establish in defendant a nonexclusive royalty-free right to practice the patented process since plaintiff had no contract with defendant for any aspect of the demonstration, there are no facts from which it might be concluded that the parties were involved in a joint venture, plaintiff received no compensation from defendant, and the expense of the demonstration was almost entirely borne by plaintiff.

United States ⇐ 97

Gilbert N. Henderson, for plaintiff. *Lawrence B. Biebel*, attorney of record. *Richard A. Killworth and Biebel, French & Bugg*, of counsel.

James D. Stokes, Jr., with whom was *Assistant Attorney General Carla A. Hills*, for defendant. *Roland H. Shubert*, of counsel.

Before DAVIS, SKELTON, and KASHIWA, *Judges*.

PER CURIAM: This case comes before the court on defendant's exceptions to a recommended decision filed by Trial Judge Hal D. Cooper on May 23, 1974, pursuant to Rule 134(h), having been submitted to the court on oral argument and the briefs of counsel. Upon consideration thereof, since the court agrees with the trial judge's recommended decision, as hereinafter set forth, it hereby affirms and adopts the same as the basis for its judgment in this case. It is, therefore, concluded that claim 1 of U.S. Patent No. 3,421,587 is valid and infringed and that plaintiff is entitled to recover reasonable and entire compensation for unauthorized use by defendant. Judgment is entered, accordingly, for plaintiff with the extent of defendant's liability to be determined in further proceedings pursuant to Rule 131(c)(2).

OPINION OF TRIAL JUDGE

COOPER, *Trial Judge:* Plaintiff alleges unauthorized use by defendant of an invention described and claimed in its U.S. Patent No. 3,421,587, entitled "Method For Mine Fire Control," issued January 14, 1969, in the names of Heavilon, Jones, and Thomas.

At issue is defendant's liability under 28 U.S.C. § 1498 for mine-fire control work performed at Monongahela City, Pennsylvania, by the Bureau of Mines.[1] Defendant denies any infringement of the patent, but asserts it is invalid and unenforceable, in any event. In addition, defendant contends that an employee of the Bureau of Mines, Malcolm Magnuson, was the originator of the process used at Monongahela City and that the patentees derived the invention from him. Alternatively, defendant maintains that Magnuson was, with the patentees, a coinventor of the process. Finally, it is contended that defendant has the right to use the invention with-

[1] Accounting, if any, has been deferred to later proceedings.

out liability either by reason of being a joint venturer with plaintiff during its development or by reason of an implied license.

For the reasons stated hereinafter, none of these defenses can be sustained and it is concluded that plaintiff is entitled to recover.

The technical subject matter in this suit relates to fly ash and a method for its use in controlling fires in abandoned mines. Abandoned-mine fires have a long history in Allegheny County, Pennsylvania, many of them burning for years, creating a health hazard, generating pollution, and inducing subsidence of the land surface. Responsive to the problems associated with these fires, both state and federal programs have been developed to combat them. The Bureau of Mines has been active in mine-fire control work since at least as early as 1949 when it created a Fire Control Group, with headquarters at Pittsburgh, Pennsylvania. By legislation enacted in 1954, funds were provided both for control and extinguishment of mine fires, and for conducting research in connection with such fires. By 1967, the Bureau had substantial experience in this field and had developed a number of techniques, including surface sealing, trenching, loading out, and water flushing, for fighting fires in abandoned mines.[2]

The patent proposes a method of controlling mine fires by pneumatically injecting a mixture of air and fly ash down a borehole into the mine cavity. Fly ash is the residue resulting from the combustion of ground or pulverized coal and is carried from the boiler by flue gases. Separated from the flue gases, it appears as a finely divided powdery substance. When mixed with air, fly ash flows like water; in a settled and aerated condition, it has an angle of repose (the angle the sides of a pile of fly ash form with the horizontal) of only about 8° to 10°. Although some commercial uses of fly ash have been found, it is generally regarded as a waste product.[3]

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[2] The responsibility of the Bureau of Mines is as stated in 30 U.S.C. §§ 551–58 (1964). A description of the techniques developed for fighting fires is contained in the findings.

[3] In 1965, only about 3% of the 20 million tons of fly ash produced was used commercially. Disposing of this waste product is a substantial problem. Utility companies will frequently pay someone to dispose of it for them.

According to the patent, pneumatic equipment such as a tanker is used to mix air with the fly ash and inject the mixture into the mine. Despite its water-like characteristics, the powdery fly ash creates a barrier of fly ash, from the floor to the roof, through which the fire will not burn. Due to the pressure under which it is injected, the fly ash is carried by the air into the cracks and fissures in the cavity through which air would otherwise be supplied to the fire. By forming an incombustible barrier completely blocking off the mine cavity, and by filling all the small cracks and voids, the fire is denied air and will ultimately die out. The patent further proposes to inject the fly ash directly onto the fire as a means of smothering it. Also contained in the patent is the disclosure that the barrier of fly ash formed in the mine cavity will provide support for the overburden, thereby preventing subsidence of the surface.

The patented process was developed in mid-1967 following a meeting between defendant's employee Magnuson and plaintiff's employee Heavilon. It is this meeting, together with a demonstration at Monessen, Pennsylvania, in July 1967, in which both parties participated, that gives rise to the inventorship and license issues in this case. However, before reaching those issues, validity and infringement will be considered.

VALIDITY

Defendant contends that claim 1 is obvious under 35 U.S.C. § 103. Claim 1 is as follows:

> A process of controlling a fire in or supporting the earth above an underground mine shaft or other earth cavity, comprising the steps of drilling a plurality of spaced holes through the overburden into the mine shaft, mixing air and finely granulated non-combustible fly ash having a size which permits at least 90% to pass through a 50-mesh screen and 75% to pass through a 325-mesh screen, injecting said mixture into the holes to fill the mine shaft beneath the holes with the fly ash, said injecting step having a sufficient volume and pressure of air so that the fly ash is carried by the air into the cracks and voids through which the air escapes to fill such cracks and voids with the fly ash, said injecting step including filling the mine shaft with fly ash along a substantial length of mine shaft to a depth equal to

the vertical height of the mine shaft to create a fly ash barrier through which fire cannot burn and to provide vertical support for the earth above the mine shaft, and then closing and sealing the holes.

In support of this defense, defendant relies principally on Anderson et al patent No. 3,152,842, Schmidt et al patent No. 2,710,232, and Bureau of Mines Report 4808.

The Anderson patent discloses a typical bulk pneumatic tanker of the type usable in practicing the patented method. It is undisputed that dry fly ash was being transported commercially by such tankers prior to the invention and that plaintiff was using such tankers in its business. The patent adds nothing to what was concededly the commercial method of transporting fly ash.

The Schmidt patent and Report 4808 both relate to a coal gasification experiment conducted at Gorgas, Alabama, by the Bureau of Mines in 1950. The purpose of the experiment was to gasify coal by igniting a coal seam and flowing air into contact with it. To enhance the contact between the air and the coal face, a barrier was formed in the mine cavity by pneumatically injecting sand through a borehole. This barrier served to retain the subsequently injected air in direct contact with the burning coal, thus enhancing the gasification process.

The experiment is covered in detail in Report 4808. The Schmidt et al patent discloses the method and apparatus used at Gorgas for fluidizing the sand and injecting it into the mine cavity.

There are substantial differences between the claimed method and this prior art, as well as the other prior art cited by defendant. Suffice to say there is nothing in any of the prior art references suggesting the pneumatic injection of aerated dry fly ash for mine-fire control work, or indeed, the use of any similar dry powdery material having a low angle of repose for building a barrier, whether for mine-fire control or surface-subsidence prevention. In view of these differences, the question is whether it was obvious to one of ordinary skill in 1967 to utilize a method of building a structural barrier by employing only air and a dry powdery material.

The unobviousness of the method is, in large part, demonstrated by the known disadvantages of the techniques heretofore employed by the Bureau in fighting mine fires. For example, defendant had previously used fly ash in a water slurry that was injected into the mine to build a barrier. One problem with the water-slurry method was that it was difficult to contain the fine particulate material; the water tended to drain away, carrying with it the small particles from which the barrier was to be constructed, and causing extensive settling. Fly ash, when aerated, exhibits the characteristics of water; hence, aerated fly ash would have suggested to those skilled in the art the very disadvantages with which they were familiar.

Related to this is the dusty, powdery nature of dry fly ash of the size specified in the claim. When dry fly ash is mixed with air and blown into a mine, the problem of confining the fly ash to build a structural barrier would appear to be severely aggravated. Indeed, when the process was first proposed, Bureau employees anticipated that the fly ash would simply dissipate as dust, instead of forming a barrier. Yet, a superior structural barrier is in fact formed by the claimed process.

Moreover, the patented process requires the injection of air into the mine. The use of air is directly contrary to the usual fire-control practice of denying air to the fire. This was another objection initially expressed by the Bureau.

Facts such as these distinguish this case from those in which the natural evolution of the art pointed the way to the claimed invention. Rather, the instant invention, by employing materials and process steps that, to one of ordinary skill, suggested problems rather than a solution, proceeds in a direction contrary to the prior art. This strongly supports the unobviousness of the claimed process. *United States* v. *Adams*, 383 U.S. 39, 52 (1966).

Other considerations support this conclusion. The lack of pertinence of the Gorgas experiment as a mine-fire control technique is demonstrated by the fact that, when the experiment was concluded and it was desired to extinguish the fire in the mine, water was pumped into the mine for 8 weeks to inundate the fire. The inundation technique was used

despite the fact that there were, on the orgas site, both a powerplant that was a source of fly ash and pneumatic-injection equipment.

The failure of others, including those highly skilled in the pertinent art, to propose this method is also a factor to be considered. *Palmer* v. *United States*, 191 Ct. Cl. 346, 423 F. 2d 316 (1970), *cert. denied*, 400 U.S. 951; *Jones Knitting Corp.* v. *Morgan*, 361 F. 2d 451, 457–58 (3d Cir. 1966). Fly ash is an old, well-known material. The Bureau, in addition to the Gorgas work in 1950 and early projects in which fly ash had been water flushed, had experimented with pneumatic injection of various materials such as mineral wool and sand. Also, gravity injection of dry sand, slag, and rock dust had been attempted. In 1966, the Bureau gave extended consideration to the use of fly ash but decided to use it in the conventional water-slurry process. Significantly, notwithstanding all of the prior work that is now asserted to render the invention obvious, it did not occur to any of these highly skilled people to try pneumatic injection of aerated dry fly ash. This failure of others, long occupied with the problem of mine-fire control, to propose the patented method, undercuts the contention the invention was obvious. *LaSalle Street Press, Inc.* v. *McCormick & Henderson, Inc.*, 445 F. 2d 84, 93 (7th Cir. 1971); *Blaw-Knox Co.* v. *Barber-Greene Co.*, 176 USPQ 214 (N.D. Ill. 1972), *aff'd without published opinion*, 180 USPQ 294 (7th Cir. 1973).

The reactions of those skilled in the field, once the invention was developed, is also a pertinent consideration. *AMP, Inc.* v. *Molex Products Co.*, 329 F. Supp. 1364, 1373 (N.D. Ill. 1971); *Hunt Industries, Inc.* v. *Fibra Boats, Inc.*, 299 F. Supp. 1145, 1149 (S.D. Fla. 1969). Almost immediately after the process was demonstrated, fire-control projects, originally planned to use a water-slurry injection technique, were altered by the Bureau of Mines to require pneumatic injection of dry fly ash. News articles hailed the process as one having great promise. Subsequent work by the Bureau at its experimental mine confirmed that the claimed process had substantial advantages over prior techniques, and employees of the Bureau extolled its virtues. It is also significant that the Bureau itself viewed the process as new and unobvious in a patentable

sense, and sought, through an application filed by its employee Malcolm Magnuson, to obtain a patent on it.[4]

In summary, considering the state of the art in the field of abandoned-mine fire control, the level of skill in that art, the differences between the claimed process and the prior art, and the relevant secondary considerations, *Graham* v. *John Deere Co.*, 383 U.S. 1 (1966), it is concluded that the process of claim 1 was not obvious within the meaning of 35 U.S.C. § 103 and that, therefore, claim 1 is valid.[5]

INFRINGEMENT

Defendant argues infringement has not been demonstrated because it has not been shown that fly ash of the claimed size was in fact used at Monongahela City. Defendant also asserts that it did not employ a method which included the step of "closing and sealing the holes" as required by the claim.

Neither contention can be sustained. The specification for the Monongahela City project expressly required the use of fly ash having the claimed size. Further, the evidence is that the method employed at Monongahela City was the same as that earlier employed by defendant on a mine-fire control project at Lloydsville, Pennsylvania.[6] Defendant's analysis of the fly ash indicates that the fly ash used at Lloydsville fell within the claimed range of sizes.

In view of the evidence, and since defendant offered no evidence to the contrary, the only inference is that this limitation of the claim was present. *Palmer* v. *United States*, *supra; cf. Marconi Wireless Telegraph Co.* v. *United States*, 99 Ct. Cl. 1, 57–59 (1942), *modified on other grounds*, 320 U.S. 1 (1943).

As to the closing and sealing step, defendant, instead of leaving the casing in the ground and capping it, pulled the casing and filled the hole with dirt. Quite literally, this is a

[4] The circumstances giving rise to the filing of that application are discussed, *infra*.

[5] Plaintiff has proposed no findings, and makes no argument, regarding infringement of claims 2–5. Accordingly, plaintiff's claim for compensation is deemed to be restricted to claim 1. It is, therefore, unnecessary to consider the validity and infringement of claims 2–5.

[6] The Lloydsville project was completed prior to issuance of the patent and is not asserted as the basis for a claim for compensation.

"closing and sealing" of the hole and is the full equivalent of capping a casing.

Plaintiff has sustained its burden of demonstrating infringement of claim 1. *Autogiro Co. of America* v. *United States*, 181 Ct. Cl. 55, 384 F. 2d 391 (1967), *rehearing denied*, 184 Ct. Cl. 801 (1968).

INVENTORSHIP

As noted above, the inventorship issue centers around a meeting on June 29, 1967, between Malcolm Magnuson, an employee of the Bureau of Mines, and Jerry Heavilon, one of the named-inventors and an employee of plaintiff. That meeting was initiated by Magnuson to obtain information regarding the bulk pneumatic tanker trucks plaintiff was using to transport fly ash. Neither Magnuson nor Heavilon could recall critical aspects of the conversation held on that day but it is undisputed that, when the two men parted, they had agreed that a test would be conducted, at a site to be selected by Magnuson, in which plaintiff would pneumatically inject dry fly ash down a borehole into a mine cavity.

On July 19, 1967, the test was conducted at Monesson, Pennsylvania, the site selected by Magnuson. Using plaintiff's equipment, fly ash was injected pneumatically down both a cold borehole and a borehole directly over the fire burning in the underground mine. Both Heavilon and Magnuson were present at the test and they, as well as all others present, believed it to be a success.

Thereafter, and in the following sequence, the Bureau of Mines issued a specification calling for pneumatic injection of dry fly ash as a fire-control method, plaintiff filed its patent application, and, substantially later, Magnuson filed a patent application claiming essentially the same method as the patent in suit.

As its principal attack on inventorship, defendant vigorously maintains that Magnuson was the originator of the claimed process and that Heavilon, during the course of the meeting on June 29, 1967, derived the idea from him. Plaintiff, with equal vigor, denies that this is the case.[7]

[7] The very able presentations of counsel have been of great assistance in resolving what is a most difficult issue, involving as it does a determination of the state of mind of an individual at a particular time.

The parties are in general agreement as to the applicable law. To sustain its defense of derivation, defendant must show that Magnuson had both a prior conception of the invention and that he disclosed it to Heavilon. *Shumaker* v. *Paulson*, 136 F. 2d 700, 703 (CCPA 1943).

The conception must be more than the realization of a desirable result, *Garrett Corp.* v. *United States*, 190 Ct. Cl. 858, 422 F. 2d 874 (1970), *cert. denied*, 400 U.S. 951, and more than a mere hope or expectation, *Alpert* v. *Slatin*, 305 F. 2d 891, 894 (CCPA 1962).

It is said that conception has been achieved when "the inventive idea is crystallized in all of its essential attributes and becomes so clearly defined in the mind of the inventor as to be capable of being converted to reality and reduced to practice by the inventor or by ones skilled in the art." *Technitrol, Inc.* v. *United States*, 194 Ct. Cl. 596, 609, 440 F. 2d 1362, 1369–70 (1971).

It is the usual rule that a claim of prior conception requires corroboration. *Kardulas* v. *Florida Machine Products Co.*, 438 F. 2d 1118, 1121 (5th Cir. 1971); *Westinghouse Electric Corp* v. *Bulldog Electric Products Co.*, 106 F. Supp. 819, 873 (N.D. W. Va. 1952), *aff'd*, 206 F. 2d 574 (4th Cir. 1953), *cert. denied*, 346 U.S. 909. However, the existence of corroboration is to be determined by viewing the evidence as a whole. *Richardson* v. *Cook*, 442 F. 2d 1398 (CCPA 1971); *Beeber* v. *Krogh*, 403 F. 2d 743 (CCPA 1968).

Once conception has occurred, the inventor may use the services and assistance of others to perfect his invention without losing his right to a patent. *Hobbs* v. *United States Atomic Energy Commission*, 451 F. 2d 849, 864 (5th Cir. 1971).

The parties' principal disagreement on the law is as to the standard of proof applicable where the defense of derivation is asserted. Plaintiff maintains that the evidence must be "clear and convincing" while defendant insists that only a "preponderance" is required.

Plaintiff's position is the correct one. The inventors as named in an issued patent are presumed to be correct. *Acme Highway Products Corp.* v. *D. S. Brown Co.*, 431 F. 2d 1074 (6th Cir. 1970), *cert. denied*, 401 U.S. 956 (1971); *Mueller*

Brass Co. v. *Reading Industries*, 352 F. Supp. 1357 (E.D. Pa. 1972), *aff'd without opinion*, 487 F. 2d 1395 (1973). Claims of prior inventorship are "subjected to the closest scrutiny," *The Barbed Wire Patent*, 143 U.S. 275, 285 (1892), and "evidence to prove prior discovery must be clear and satisfactory," *Eibel Process Co.* v. *Minnesota & Ontario Paper Co.*, 261 U.S. 45, 60 (1923). Since conception is an act of the mind, 1 RIVISE & CAESAR, INTERFERENCE LAW AND PRACTICE § 118 (1947), the temptation for even honest witnesses to reconstruct, in a manner favorable to their own position, what their state of mind may have been years earlier, is simply too great to permit a lower standard.[8] *The Barbed Wire Patent*, *supra; Acme Highway Products Corp.*, *supra*. Nor is the standard of proof any lower when a prior conception is asserted as the basis for a derivation argument. *Egnot* v. *Looker*, 387 F. 2d 680 (CCPA 1967); *Williams* v. *Clemons*, 19 F. 2d 798 (D.C. Cir. 1927).

Thus, to sustain its defense of derivation, defendant must first show, by clear and convincing evidence, that Magnuson had a prior conception of the claimed subject matter. Since the conception must have been of the invention defined in the claims, *Ritter* v. *Rohm & Haas Co.*, 271 F. Supp. 313, 323 (S.D. N.Y. 1967), it is well that an analysis of this issue starts with the claim itself.

Claim 1 is a method claim, delineating certain method steps to be employed while using certain defined materials to accomplish a specified result. The materials specified are air and fly ash, with the fly-ash size being so defined that it is in the nature of an essentially powdery substance. Using these two defined materials, the claimed method specifies, first, mixing the air with the powdery fly ash and, second, injecting the mixture under sufficient volume and pressure of air into a mine cavity so that the injecting air carries some of the fly ash into the cracks and voids while depositing the remaining fly ash to build up an incombustible structural barrier from the floor to the roof along a substantial length of the mine. It is this claimed invention that is the focal

[8] Defendant's witness Magnuson demonstrated a commendable appreciation for this problem. He forthrightly acknowledged the difficulty of separating in his mind what were the actual facts from what he now, years later, would assume the facts to have been.

point around which the inquiry into prior conception must revolve.

In the context of the claimed process, it is well to note at the outset that it is insufficient, on the issue of prior conception, merely to show prior knowledge of the broad idea of hooking up a pneumatic tanker to a borehole extending into a mine cavity. Rather, it must be shown that, in addition to this broad idea, there was a realization, in finite terms, of the means or process steps by which the desired result of extinguishing a fire would be achieved. *Gathmann* v. *Clarke*, 45 App. D.C. 512 (1916); *Forgie* v. *Oil-Well Supply Co.*, 58 F. 871 (3d Cir. 1893); *Biel* v. *Chessin*, 347 F. 2d 898 (CCPA 1965); I ROBINSON ON PATENTS § 79 (1890).

Turning then to the issue of whether Magnuson, prior to June 29, 1967, had a conception of at least the critical features of the claimed invention, the evidence falls substantially short of being clear and convincing that he did. Magnuson testified that he first learned about bulk pneumatic tankers for hauling fly ash on June 26, 1967, during the course of a chance conversation with Donald Nagode and Jesse Cutlip. Both of these men were familar with fly ash and the use of bulk tankers for transporting that material. During the course of this conversation, Nagode explained how the tankers were used to blow dry cement or dry fly ash into storage bins and commented that if fly ash could be blown up into bins, it could be blown down into a mine. Nagode and Cutlip then briefly outlined the operation of these tankers to Magnuson and suggested that he contact plaintiff for any further information. Thereafter, Magnuson attempted to obtain, over the telephone, some additional information regarding the trucks but was referred to Heavilon and a meeting was then set up for June 29, 1967.

Although Magnuson testified that Nagode's disclosure of the existence of pneumatic tank trucks "looked like the answer to what we were wrestling with here these months about the use of fly ash," the evidence does not satisfactorily demonstrate that this "answer" was a conception of the claimed invention. Magnuson did not amplify his testimony in this respect so it is uncertain what he conceived to be the "answer." However, he had no experience with dry fly ash and no

specific knowledge about pneumatic tankers, how they operated to aerate fly ash, and their injection pressures. Further, he believed dry fly ash would plug the borehole, that the injection of air into the mine might feed the fire much like a forge, and that injecting fly ash under pressure would cause the fly ash to dissipate as dust. It was not until after the demonstration in July and, to some extent, after some Bureau experiments in October, that Magnuson was satisfied that none of these beliefs was correct.

Since the characteristics of dry fly ash, the mixing of air with fly ash, and the formation of a fly-ash barrier are all aspects of the claimed invention, the foregoing would suggest that whatever answer Magnuson believed Nagode's suggestion represented, it was substantially less than a firm conception of the process by which a pneumatic tanker could, when connected to a borehole, be operated to inject fly ash to extinguish a mine fire. At best, it would appear that Magnuson had a general, vague idea that a pneumatic tanker could be useful in fighting fires but the manner of using it, the specific process steps by which the desired result could be achieved, were not then perceived by him.

Other evidence in the record lends support to that conclusion. Magnuson's diary entry following his meeting with Nagode merely referred to Nagode's suggestion and nothing more. Thereafter, but prior to the meeting with Heavilon, Magnuson mentioned this subject to no one. This absence of any contemporaneous disclosure of the claimed process, when it allegedly was the answer to a difficult problem, raises substantial doubts that Magnuson went into the meeting with Heavilon with anything more than the generalized suggestion of Nagode that "if you can blow fly ash up, why can't you blow it down." This is further corroborated by his forthright admission that, both prior to and after the demonstration, he drew no conclusions as to what had happened to the fly ash once it was down in the mine.

Nor is the evidence satisfactory that Magnuson, even if possessed of the conception, communicated it to Heavilon. He testified that he had no recollection of this but believed that it would have been logical that he would have told Heavilon he was interested in using pneumatic tankers to

blow fly ash into a mine.[9] However, both Heavilon and Magnuson made written reports or notes shortly after their meeting. Magnuson's notes offer no indication of who raised the topic of pneumatic injection of fly ash but Heavilon's notes allocate the suggestion to himself. While the self-serving nature of these notes is apparent, yet they were made essentially contemporaneously with the meeting and long before any controversy had developed. They are, therefore, entitled to some weight. *Cf. Pacific Far East Line, Inc.* v. *United States*, 184 Ct. Cl. 169, 394 F. 2d 990 (1968).

In support of its derivation defense, defendant places great stress on the fact that the meeting was initiated by Magnuson, not Heavilon; the superior knowledge of Magnuson in the field of mine-fire control; and the fact that only Magnuson had knowledge of Nagode's earlier suggestion.

That Magnuson is a thoroughly competent and highly respected mining engineer with long experience in the field of mine-fire control is undisputed. Nor is it disputed that Heavilon had no prior experience with mine fires. However, Heavilon had the superior knowledge as to dry fly ash, its characteristics when aerated, and the method of operation of the trucks used to transport and inject the fly ash. While logic, applied to the facts with the benefit of hindsight, may suggest that the one endowed with the greater knowledge would be the more likely to have originated an idea, the instances where the experts have been confounded, see, *e.g.*, *United States* v. *Adams*, *supra*, are too frequent to rely too heavily on logic to establish the fact. Here, the pertinent knowledge was partially held by each so the knowledge factor is an ambiguous one at best.

Nor does the fact Magnuson initiated the meeting necessarily confirm a prior conception. That Magnuson sought the meeting to learn more about pneumatic trucks is clear but the question remaining unanswered by the evidence is as to why he wanted the information and to what use he intended to put the trucks. Was it for the purpose of pneu-

[9] In his invention disclosure report submitted to the Department of the Interior, Magnuson stated that he first communicated the idea to others in July 1967, a date subsequent to his meeting with Heavilon.

matically injecting fly ash in accordance with the claimed method? Or was he seeking information simply as a first step in a general evaluation of how these trucks might be useful in connection with his work? Or did he contemplate that the trucks, with their long hoses, would provide a possible way for delivering the fly ash directly to the borehole for the water-flushing operation, thereby eliminating the double-handling of the fly ash theretofore required? The evidence, even when considered in light of Magnuson's knowledge of Nagode's suggestion, does not point to any particular conclusion but, rather, supports in varying degrees each one of them.

In the absence of clear testimony by Magnuson as to a specific prior conception, the absence of corroboration either by any witness or by any document as to the fact of such a conception, and in view of the doubts, concerns, and lack of specific information he possessed, it is concluded that defendant has failed to sustain its burden of proving either a prior conception by Magnuson or a communication of that conception to Heavilon.

The second branch of defendant's attack on inventorship is that Magnuson, if not the prior inventor, was a joint inventor either "with Nagode and/or Cutlip, or with Heavilon, Thomas, and/or Jones." [10]

Where more or less than the true inventors are named, the patent is void. *Iowa State University Research Foundation, Inc.* v. *Sperry Rand Corp.*, 444 F. 2d 406, 408 (4th Cir. 1971). However, misjoinder and nonjoinder of inventors are technical defenses requiring clear and convincing evidence. *Garrett Corp.* v. *United States*, *supra*, at 869, 422 F. 2d at 880. A claim of coinventorship is also viewed with skepticism and requires clear and convincing evidence. *Acme Highway Products Corp.* v. *D. S. Brown Co.*, *supra; Mueller Brass Co.* v. *Reading Industries*, *supra; Layne-New York Co.* v. *Allied Asphalt Co.*, 363 F. Supp. 299 (W.D. Pa. 1973), *rev'd on other grounds*, 501 F. 2d 405 (1974).

[10] Although a party may plead alternatively and inconsistently, the multiple theories of inventorship advanced by defendant in this case tend to confirm the lack of clear and convincing evidence in the record to support any one theory.

Since the chain of events leading up to plaintiff's filing of its patent application commenced with the Magnuson-Heavilon meeting, the coinventorship argument is, at first blush, an appealing one. However, acceptance of that conclusion requires suppositions and assumptions that are not supported by the testimony of either participant.

The difficulty in finding Magnuson to be a coinventor is essentially the same as that encountered with the derivation defense. There is simply insufficient evidence as to what Magnuson may have contributed. If anything, the evidence would suggest that he may have passed along Nagode's comment to Heavilon. Of course, that would, at best, make Nagode, not Magnuson, a coinventor.

Nor does the fact that Heavilon and Magnuson agreed to conduct a test dictate a conclusion of joint inventorship. When Magnuson left the meeting, it was his understanding that a test would be conducted in which plaintiff would supply one load of fly ash and demonstrate that it could be injected pneumatically down a borehole without plugging the hole. But the fact of their agreement to conduct a test of that character does not resolve the issue of their respective contributions; nor does it clearly indicate that during and after this meeting, and through their united efforts and mutual contributions, *Monsanto Co.* v. *Kamp*, 269 F. Supp. 818 (D.D.C. 1967), there evolved the claimed invention.

The facts are simply that Magnuson and Heavilon agreed to conduct a test and that Magnuson selected a site and prepared a fitting to permit attachment of plaintiff's trucks to the borehole casing. To read into or infer from those facts any particular contribution by Magnuson to the *claimed* process is singularly inappropriate when even Magnuson offered no substantial testimony beyond those facts.

It is concluded that the proofs are insufficient to establish Magnuson as a coinventor. *Layne-New York Co.* v. *Allied Asphalt Co.*, *supra*.

The same problem, insufficient proof, is present with the third branch of defendant's attack on inventorship, which is that Thomas and Jones were improperly joined as inventors with Heavilon.

There is no question but that, as among the three named inventors, Heavilon had the basic idea of pneumatically injecting dry fly ash to seal off the fire. However, after his meeting with Magnuson, Heavilon was uncertain as to what would happen to the fly ash, once it was down in the mine, and had reservations about the efficacy of the process. While Heavilon possessed an idea that encompassed the manipulative step of connecting a pneumatic tanker to a borehole extending into a mine cavity, it has not been shown that this idea extended to all aspects of the claimed process. Rather, the record indicates that it was not until the subsequent meeting with Thomas and Jones that the process was thought through, both as a fire-control technique and as a surface-subsidence measure. Matters such as the lateral travel of the fly ash in the mine, its bulking characteristics when wet, the size, carbon content and angle of repose of fly ash, and injection pressures to use in injecting the fly ash, were discussed by the three men. All of these matters are pertinent, in some degree, to a perception of how fly ash can be injected to achieve the desired results.

In view of this, it cannot be found by clear and convincing evidence that Thomas and Jones contributed nothing to the final conception of the method as it is expressed in the claims of the patent. *See*, *Mueller Brass Co.* v. *Reading Industries*, *supra* at 1372.

LICENSE

Finally,[11] defendant argues that it is entitled to a nonexclusive, royalty-free right to practice the patented method by reason of the contributions made by its personnel and the use of its facilities during the demonstration on July 19, 1967.

Plaintiff had no contract with defendant for any aspect of that demonstration, and there was no "close and umbilical connection," *Mine Safety Appliances Co.* v. *United States*, 176 Ct. Cl. 777, 364 F. 2d 385 (1966), with any work being done under a Government contract. Nor are there any facts from which it might be concluded that the parties were involved in a joint venture. *Compare*, *Technical Development*

[11] The defense of unenforceability, premised on fraud on the Patent Office, has not been established, *Layne-New York Co.* v. *Allied Asphalt Co.*, *supra*; *Mueller Brass Co.* v. *Reading Industries*, *supra*, and merits no comment. See finding 31.

Corp. v. *United States*, 202 Ct. Cl. 237 (1973), *cert. denied*, 416 U.S. 983 (1974).

Plaintiff received no compensation from defendant. The expense of the demonstration was almost entirely borne by plaintiff, the only cost to defendant being a fitting it fabricated so that the hoses on plaintiff's trucks could be connected to the pipes in the boreholes. These facts, together with the absence of any contractual relationship, readily distinguish this case from *Ordnance Engineering Corp.* v. *United States*, 68 Ct. Cl. 301 (1929), *cert. denied*, 302 U.S. 708 (1937).

The license defense cannot be sustained.

In summary, it is concluded that claim 1 is valid and infringed, that defendant has no license to use the invention defined therein, and that plaintiff is entitled to recover reasonable and entire compensation for such use.

FINDINGS OF FACT

1. United States Patent No. 3,421,587 for "Method For Mine Fire Control" was issued on January 14, 1969, on an application filed September 20, 1967, jointly by Jerry A. Heavilon, Dennis A. Jones, and Barton A. Thomas, and assigned to plaintiff.

2. Plaintiff was incorporated in the State of Ohio in 1960. On January 1, 1972, plaintiff changed its name from Dayton Fly Ash Co., Inc., the style in which the petition herein was filed, to Amax Fly Ash Corporation.

3. Defendant is charged to infringe the patent in suit by reason of certain mine-fire control activities of the Bureau of Mines, Department of the Interior, in the control of fires in abandoned mineworkings at Monongahela City, Pennsylvania.

4. (a) The patent proposes a method of controlling mine fires by pneumatically injecting a mixture of air and fly ash down a borehole into a mine cavity thereby to create a barrier of fly ash through which the fire will not burn. Due to its powdery nature and the pressure under which it is injected, the fly ash is carried by the air into the cracks and voids through which air would otherwise be supplied to the fire. By forming a barrier completely blocking off the mine cavity, and by filling all the small cracks and voids, the fire

is denied air and will ultimately die out. The patent further proposes to inject the fly ash directly onto the fire as a means of smothering it.

(b) Claim 1, the only independent claim, describes a method that involves, (1) drilling a plurality of holes from the surface into the mine, (2) mixing air with fly ash, the fly-ash size being so defined that it is in the nature of an essentially powdery substance, (3) injecting the mixture through the boreholes with sufficient volume and pressure that the injecting air carries some of the fly ash into the cracks and voids while depositing the remaining fly ash to build up an incombustible barrier from the floor to the roof along a substantial length of the mine, and (4) closing and sealing the holes.

5. Fly ash is a finely divided, powdery substance that results from the combustion of ground or pulverized coal and is transported from the boiler by flue gases where it is separated, as by mechanical or electrostatic precipitators. Although it contains a small amount of carbon, fly ash is for all practical purposes incombustible. It is produced in the United States in quantities which substantially exceed the rate at which it is used in commerce, with the excess fly ash disposed of by such means as in landfills. It is estimated that in 1965 only about 3% of the 20 million tons of fly ash produced was used commercially.

6. When fly ash is collected by the powerplant, it is in a dry state. One hundred percent pure dry fly ash, in a tightly packed or solid condition without air spaces or voids between its particles, weighs about 140 to 160 pounds per cubic foot. When it is transported in open trucks, it is necessary to dampen it with about 10 to 14 percent of water to prevent it from blowing away. Its angle of repose in this dampened condition is about 35°.

It can also be loaded into pneumatic bulk tankers and then allowed to settle into its so-called nonaerated condition in which it consists of about 50% air and 50% fly ash by volume. In such condition, it would not be readily discharged by gravity; therefore, unloading requires that additional air must be added to the fly ash in the tanker. Aerated fly ash can be unloaded by a conventional pneumatic tanker at the

rate of about one ton of fly ash per minute. Aerated fly ash runs like water and, when it settles, it has a low angle of repose of about 8° to 10°.

7. (a) Mine fires can be divided into two categories: 1) active mine fires and 2) inactive mine fires.

In an active mine fire, the fire is discovered almost immediately and the operator takes immediate steps to control the fire by using hoses or rock dust. The entries surrounding the fire are generally accessible so firefighters can attack the source of the fire directly.

The prevention and control of fires in inactive coal deposits, where there is no operator around, present entirely different problems, and different techniques for fighting the fire are involved. Often, fires in abandoned mines burn for years before steam is observed or the temperature breaks out and the fire is discovered. By this time there is no access to the underground workings and the fire has to be fought from the surface. Furthermore, confusion and indecision often prevail as to the responsibility for taking the necessary action to control a fire in an abandoned mine.

(b) Fires have been known to burn for years in abandoned mineworks. Such fires induce subsidence of the land surface, cause pollution, and present a health hazard when carbon monoxide is liberated. Abandoned mines have a tendency to burn out in one area and propagate in another. There is a long history of mine fires burning in Allegheny County, Pennsylvania, a condition that has existed for many years.

8. Prior to June 1967, fires in abandoned mines were controlled by techniques such as, for example, surface sealing, trenching, loading out, and water flushing.

a) *Surface sealing*

As a fire burns in a mine, it causes crevices and caving of the surface, and these crevices create chimneys which pull air from other interconnected works. Surface sealing involves filling the crevices at the surface. This is accomplished by plowing the surface with a bulldozer with an angled blade, to a depth of 4 to 6 feet, pulverizing the surface, and covering the cracks and crevices. If this operation has to be carried out in a forest, the trees have to be cleared, the roots pulled up, and the area denuded in order to plow it. In a surface-sealing

project, there is usually at least 2 years maintenance because, in cooling down, it is not unusual to get caved areas and additional crevices. A fair-weather inspection road is built over the area so that periodic inspections for cracks, crevices, steam, subsidence, or any other condition that might indicate a disturbance can be carried out.

b) *Trenching*

A barrier is formed by digging a trench from the surface, through the coalbed around behind the fire and out on the other side, to isolate the fire and cut off the contiguous working in the coalbed from the fire. The bottom of the trench has a width of 12 to 14 feet and the trench may be as deep as 60 feet. It is then backfilled with the removed material, with the burnables and nonburnables selectively returned to the trench in such a manner that the fire is presented with the nonburnables at the level of the coalbed. A variation on this, called a plug barrier, is employed whenever it is impractical to dig a trench all around the fire.

c) *Loading out*

This simply involves digging out the burning material and spreading it out to cool. Loading out is only feasible if performed shortly after a fire has started.

d) *Water flushing*

This technique has been used when surface sealing, trenching, or loading out were not practical. Boreholes are drilled from the surface into the coalbed and into the mine cavity, and the cavity at the bottom of the borehole is filled with a solid material conveyed into the hole by water. The materials generally used are granulated slag, sand, and crushed limestone with a maximum size of one-fourth inch. The purpose of water flushing is to fill the void in the mine with the solid material, thereby to prevent air circulation and smother the fire. To accomplish this objective, a series of boreholes, which, for example, may be about 10 feet apart, are drilled and flushed. In this manner one is able to build a barrier and thereby prevent the fire from propagating. This technique can also be used to apply water, and the material being flushed, to the source of the fire, if known. The disadvantages of this method include its cost, the nonavailability of water in some areas, the large quantity of water needed, the neces-

sity to suspend operations during cold weather when water might freeze, the messiness of the operation, the inability to control deposition of the material, the lack of an effective seal at the roof, and the tendency of the material to settle or shrink as the water drains away. Despite these substantial disadvantages, water flushing represented the best solution, prior to mid-1967, to the problem of fighting a fire in a mine that was either too deep or so located that other techniques such as trenching out could not be used.

e) Inundation is another method of mine-fire control. This requires flooding of the mine with water. A major problem with this technique is that crop fires are usually above drainage and it is very difficult to create barriers for holding the water.

f) In 1963 the Bureau of Mines experimented with the pneumatic injection of mineral wool or sand through a borehole to create a remote seal in a mine entry. When this technique was used on an actual mine fire, it was not considered successful because it only sealed about 95% of the entry. The preferred apparatus, developed as a result of this experimental work, used either a bottled inert gas or gases withdrawn from the mine itself as the gaseous medium for conveying the mineral wool into the mine cavity. With this apparatus, introduction of additional oxygen to the burning coal was avoided. This work is reported in Bureau of Mines report RI 6453.

9. Prior to July 1967, the Bureau of Mines had used fly ash in fire-control projects on three occasions. In 1954, damp fly ash, which had been transported in an open truck, was hand-shoveled into crevices in a surface-sealing mine-fire control project. In 1958 and 1959 at Monessen, Pennsylvania, fly ash was used as the flushing material in a water-flushing mine-fire control operation.

10. In 1966 and the first part of 1967, Malcolm Magnuson, a supervisory mining engineer for the Bureau's mine-fire group, was working on a project to control mine fires at Lloydsville, Pennsylvania, and Monongahela City, Pennsylvania. In connection with these projects, Magnuson had reviewed the advantages and disadvantages of using a water flush to extinguish these fires. Despite a number of objections

and potential problems that he anticipated with the use of a fly-ash slurry, he eventually decided that use of this technique would be the method of choice. A prime consideration in the selection of this method was that under the law, the local government was required to purchase the extinguishing material, and the relatively inexpensive nature of the fly ash compared to other materials made it affordable for the local governments. Through the first half of 1967, plans proceeded for using a fly-ash slurry flush at both mine-fire sites. During all this preparation, which involved numerous meetings with many individuals, no one suggested the pneumatic injection of dry fly ash to extinguish the fires.

11. Among those participating at various times in these planned meetings were highly skilled and experienced people, both in the field of mine-fire control and in the field of fly-ash utilization. One of the participants was Gerard Gambs, an employee of Consolidated Coal. Gambs was familiar with fly ash, pneumatic tankers, and mine fires. He was urging water flushing of fly ash as the technique to be used.

12. Magnuson had several reservations about the use of fly ash for water flushing. One concern was the hauling and handling charges. Although the material itself was free, hauling the material was an expense. He devoted significant time to investigating these hauling charges which, in open dump trucks, were in excess of $2 per ton. In addition, unless the flushing holes were accessible to the trucks delivering the fly ash, there was the need for additional equipment to carry the fly ash from where the trucks deposited it over to the borehole. Another reservation he had regarding the use of fly ash was its fine size. He was concerned that the fine fly ash would be carried away by the water instead of settling out to build a barrier as occurs when a coarser material is employed. Also, problems had been encountered with the boreholes being plugged by the material, partly due to the difficulty in mixing the fly ash with the water.

13. On March 14–16, 1967, the Bureau of Mines, jointly with the Edison Electric Institute and the National Coal Association, sponsored a fly ash utilization symposium in Pittsburgh, Pennsylvania. Over 500 persons, both from this

country and abroad, and all of whom had a serious interest in fly ash and its utilization, attended the symposium. Although a wide variety of uses of fly ash were discussed, no mention was made of using dry fly ash in mine-fire control.

14. (a) On Monday, June 26, 1967, Magnuson was observing a conventional plug and surface seal mine fire control project in Robinson Township, Pennsylvania, and entered into a discussion with Donald Nagode and Jesse Cutlip who were on the site also observing the project. It was Nagode's company that was doing this fire-control work. Nagode was also the operator of a cement block company in Robinson Township, Pennsylvania, and used fly ash in this business. Both Nagode and Cutlip were familiar with the fact that dry fly ash was being delivered in bulk pneumatic tankers and blown up through a pipe into surface storage bins of customers such as Nagode.

(b) During the ensuing conversation between Magnuson, Nagode, and Cutlip, the subject matter of mine fires came up, including the technique of drilling holes into the mine and slurrying material in with water, the planned future water flushing of fly ash in the abandoned mine-fire control projects, and the difficulty of mixing fly ash with water.

(c) Nagode mentioned that there were available bulk pneumatic tankers which carried fly ash and suggested that Magnuson could blow fly ash directly therefrom down a borehole into the mine. Nagode explained how such tankers hooked up to a fitting on the bin at his cement block plant to blow fly ash into the bin. As a result of this conversation, Magnuson understood that a tanker did not unload merely by gravity flow but that it would blow fly ash through a pipe and into a bin.

(d) Magnuson at that time was familiar with fly ash but had no experience with dry fly ash; nor was he familiar with the commercially available bulk pneumatic tankers for transporting fly ash. Upon expressing an interest in obtaining more information about the tankers, Jesse Cutlip explained that his son, William C. Cutlip, was employed by plaintiff at its offices near Pittsburgh, in New Eagle, Pennsylvania, and suggested that William could provide Magnuson with more

information about pneumatic tankers. Magnuson's diary for June 26, 1967, contains the following entry:

> At site talk to Donald Nagode & Jesse Cutlip of Masters Builders about fly ash use. He suggests blower trucks to put fly ash into mine.

15. On June 27, 1967, Jesse Cutlip spent the evening with Jerry Heavilon, an employee of plaintiff, to discuss business matters of mutual interest. Cutlip told Heavilon that Magnuson was interested in having a meeting with him, but the pneumatic injection of fly ash for mine-fire control was not discussed. Cutlip did provide Heavilon some background information on the characteristics of a mine fire and the problems associated therewith. This was Heavilon's first exposure to mine fires.

16. Following Jesse Cutlip's suggestion, Magnuson called William Cutlip on June 28, 1967. Although Magnuson does not recall the substance of the conversation, his purpose in calling was to obtain further information regarding the tank trucks and he believed that the information he sought could be obtained over the telephone. However, William Cutlip advised Magnuson that he did not handle the information requested and arranged to have Magnuson meet with Heavilon on June 29, 1967. Aside from this conversation, Magnuson did not discuss the matter of pneumatic tankers with any one until the meeting with Heavilon.

17. (a) Magnuson and Heavilon met on the morning of Thursday, June 29, 1967, in plaintiff's office, located in the Mitchell Power Plant of the West Penn Power Company in New Eagle, Pennsylvania. The conversation took place first in the office, then outside in a yard adjacent to the powerplant where a bulk pneumatic tanker was parked, and then at the Monongahela City mine-fire site which was nearby. The meeting lasted about 3 hours.

(b) Magnuson asked Heavilon questions about, and received information regarding, pneumatic tankers, their capacity, loading and unloading time, hauling rates, and rental rates. Heavilon gave Magnuson information about dry fly ash, the types of fly ash available at the West Penn Power Station and, also, showed Magnuson a pneumatic tanker and explained its operation. Heavilon asked Magnuson questions

about, and received information regarding, mine fires. Magnuson drove him to the nearby Monongahela City site, which Magnuson explained was a future mine-fire control site. Magnuson explained the present wet-flushing operation, the grid system of holes, and the use of mine maps. Heavilon understood from Magnuson that a borehole is taken down to a mine cavity and that soil or other granular material is dumped down into the cavity in a slurry form to fill up the cavity and stop the progress of the fire. He also learned of the use of fly ash, fine clay, limestone dust, and other materials in the slurry.

(c) Neither Heavilon nor Magnuson could recall the meeting with sufficient clarity to testify as to who it was that first brought up the idea of pneumatically injecting dry fly ash. It was Heavilon's recollection that the subject was first raised while they were at the Monongahela City fire site and that he asked Magnuson whether the contract specifications could be changed to allow dry injection rather than the wet flush of fly ash.

(d) By the time Heavilon and Magnuson parted on June 29, 1967, it had generally been concluded by both that the pneumatic-injection idea should be pursued further by a test to demonstrate that fly ash could be injected without plugging the hole. Heavilon agreed to supply a truckload of fly ash and a particular fitting for the truck for the test, and Magnuson agreed to provide a test site and a special adapter which would permit connection of the hose on the pneumatic tanker with the metal casing of the boreholes that had been drilled into the mine.

18. Subsequently, both Heavilon and Magnuson made notes of that meeting, Heavilon's being in the form of a call report and Magnuson's being in his daily diary. Heavilon's report, written on June 30, 1967, is as follows:

> Met with Malcolm Magnuson of the B. of Mines with reference to the fire at Mon City. They presently use fly ash, fine clay, limestone dust, etc. to slurry and place in holes drilled on 10′ grids by front end loader at a rather prohibitive cost. His first question was about the cost of fly ash vs. other materials. I told him that the cost would be approx. $1.50 per ton plus trucking. This

is comparable to other materials providing fly ash source is close.

At the same time I asked him if dry fly ash could be delivered to the site and blown directly into the mine to seal off the fire. He said he could see no reason that the bids couldn't be received this way. I couldn't guarantee him that this would work but that we would be most happy to try this method at their experimental mine in the southern end of Pittsburgh.

This was agreeable to him, we furnished him with a Kamlock fitting to make a pipe and fitting to receive a load to test. I expect to run this test within the next three weeks. If it does work, there are approx. 5 mine fires now burning that this method would be applicable. Their usage is approx. 100 ton per day.

Magnuson's diary contains the following entry for June 29, 1967:

To Mitchell Power Plant at 9:00. Meet Jerry Heavilon Chief engr. Dayton Fly Ash view Blower tank truck for ash delivery—truck capacity 20 tons would rent for about $20.00/hr. Can deliver fly ash 60–100 ft from hole will try to set up test for blowing ash into borehole.

19. Following the meeting with Heavilon, Magnuson spoke about the project with Gerard Gambs, an individual knowledgeable about fly ash as well as pneumatic tankers. Magnuson had two major concerns. Although he had no understanding, as of that time, as to what would happen to the fly ash once it was down in the mine, his immediate concern was whether the dry fly ash would plug up the moist borehole. Magnuson knew from prior experience that most boreholes have moist sides and, in the past, such holes were plugged up when slurries were run through them. His second major concern was the effect of introducing so much air into the mine. He felt that it might act like a forge on the fire. Gambs expressed the belief that pneumatic injection of dry fly ash was a good idea but that it had never been tried before. Gambs and Magnuson discussed the possibility of injecting the fly ash by a combined stream of air and water; however, nothing further was done with that idea.

20. (a) Following the June 29th meeting with Magnuson, Heavilon returned to plaintiff's main office in Dayton and related the substance of his conversation with Magnuson to

Barton Thomas, Dennis Jones, and John Thomas, who was president of the company. The other two men are employees of plaintiff and are, with Heavilon, the named coinventors of the patent in suit.

(b) Thomas and Jones were experienced in the handling characteristics of dry aerated fly ash. Jones had particular knowledge as to the physical properties of fly ash, while Thomas had worked with fly ash since the 1950's and was acquainted with its ability to penetrate small spaces as well as its ability to absorb moisture and become hardened. Thomas had previously used fly ash to smother surface fires.

(c) Heavilon explained his idea of injecting dry fly ash into the mine but expressed reservations about whether it would work and what would happen to the fly ash once it was down in the mine. An extended discussion then ensued, during the course of which Heavilon, Jones, and Thomas discussed surface subsidence, the lateral travel of fly ash in a mine, the angle of repose of the fly ash, the size and carbon content of the fly ash, the ability to inject fly ash into a mine filled with water, suitable injection pressures, and the bulking of fly ash. Thereafter, additional meetings were held prior to the demonstration on July 19, 1967. Jones conducted a test in which fly ash was injected under water, and satisfactorily demonstrated that they could pneumatically inject fly ash into a water-filled mine.

21. The lateral travel and angle of repose of fly ash is pertinent to whether a barrier is formed and the thickness of that barrier. The bulking characteristic is a consideration in the structural support that such a barrier would provide for preventing surface subsidence. The carbon content is determinative of combustibility and the size of the fly ash, as well as the injection pressures, are considerations in the ability of fly ash to penetrate cracks and crevices.

22. Magnuson selected as the site for the test the mine-fire control project in the city of Monessen, Pennsylvania, in which a barrier had been flushed around the fire by conventional means, and in which a series of cased boreholes for monitoring the effectiveness of the barrier had been placed on the cold side of the barrier. While the conventional flushing boreholes were on approximately 10-foot centers, the in-

spection boreholes were on approximately 40-foot to 50-foot centers.

23. (a) Magnuson met Heavilon on the morning of July 17, 1967, and drove to the Monessen site. Heavilon's purpose in viewing the site was to see if there would be any difficulty in getting the equipment in or out, to make sure the casing and adapter were ready, and to go through a dry run. At that time, Heavilon was told by Magnuson that he could use one of the inspection casings for injecting fly ash into the mine and it was determined that the test would be run on July 19th.

(b) On Tuesday, July 18, Heavilon and Barton Thomas met with their truckdriver and instructed him on the procedures to be used. Barton Thomas and Heavilon visited the Monessen site together and went through the procedures they were going to follow the next day. They decided that Thomas would stay next to the truck and give the driver instructions while Heavilon would position himself at the other end of the hose at the borehole.

24. (a) On the morning of July 19, the experiment was conducted at the Monessen, Pennsylvania mine. A bulk tanker was parked near one of the boreholes and the fly ash was pumped out of the tanker and into the mine. Both Heavilon and Magnuson were surprised at the ease with which the tanker was able to unload the fly ash without encountering any problems. After the first tanker was emptied, plaintiff, on its own initiative, supplied five additional tankers, with a total of 125 tons of fly ash, all from boiler 33 of the West Penn powerplant, being injected. Fly-ash discharge was visible from other boreholes that had been drilled into the mine cavity and which were up to 50 feet away from the injection hole. All those who were present considered the demonstration to be a success; however, Magnuson at that time drew no conclusions from the test as to what had in fact happened to the fly ash in the mine.

(b) After a while, plaintiffs asked if they could inject some fly ash into a borehole that was directly over the fire. At first Magnuson was concerned about putting air on the fire but finally allowed injection into this so-called "hot hole." A thermocouple in the hot hole showed a temperature of

290° F. at the start of the injection; it fell to 110° F. after injection.

(c) During the demonstration, plaintiff had control over the operation of the truck and the apparatus on the truck while Magnuson had control over the site itself and the selection of the boreholes through which the fly ash was injected. The type of fly ash used was selected by plaintiff, as was the rate of injection and the ratio of air to fly ash. The instruments, such as thermocouples, available at the site, were supplied by Magnuson.

(d) Plaintiff was never reimbursed or paid in any way for its services, personnel, equipment, or fly ash supplied at Monessen, nor has plaintiff ever received or entered into any contract with defendant in which it received money for development or use of the patented process. The major portion of the expense involved in the demonstration was borne by plaintiff; defendant's only expenditure was in providing a fitting to attach the hose to the pipe in the borehole.

25. On July 20, 1967, Magnuson arranged for a meeting to be held on July 28 with state and local officials to discuss the Lloydsville fire-control project. By July 28, a report evaluating the Monessen experiment had been prepared under Magnuson's supervision. Calculations made in the preparation of that report indicated that Magnuson's concern about using air as the injecting medium was unfounded. At the meeting on July 28, it was agreed to change the specification for the Lloydsville fire-control project to call for pneumatic injection of dry fly ash. At that time, it was contemplated that the carbon content of the fly ash would be not over 6% and that 85% of the material would pass through a 200-mesh screen.

Subsequently, and upon request from Magnuson's office, Heavilon made recommendations regarding the type of equipment and its operation to include in the revised specification. Heavilon also recommended that the fly ash meet ASTM–C–350 in order to assure a particular fineness and suggested a maximum allowable carbon content of 8%.

26. By letter dated July 31, 1967, Barton Thomas disclosed the subject of the patent in suit to his patent attorneys. That

disclosure explained the value of the proposal, both for mine-fire control and surface-subsidence prevention. Among the information contained in the description was the low-carbon content of fly ash, its fineness (75% passing a 325-mesh screen) and consequent ability to fill small cracks, its fluidity, the ability of air to carry the ash laterally over substantial distances, the building up of a barrier both over and around the fire, and the structural support the barrier would provide for the surface.

27. By August 11, 1967, Magnuson had completed revising the Lloydsville specification. Heavilon's recommendations regarding the equipment were incorporated in the specification, as was the recommendation as to carbon content. The size range of the fly ash was specified as 90% through a 50-mesh screen and 75% through a 325-mesh screen. Both fly ash from boiler 33 of the West Penn powerplant and fly ash, meeting ASTM–C–350, would fall within that size range. The 90% limitation was a recommendation of Gerard Gambs.

28. Plaintiff received a copy of the revised Lloydsville specification on or about August 11, 1967, and submitted a bid but was unsuccessful. Although bids were opened on September 6, 1967, award of the contract to the winning bidder was delayed until December 1, 1967. Work at Lloydsville commenced on December 5, 1967, and the project was successfully completed on June 18, 1968.

29. On September 20, 1967, a date prior to the scheduled commencement of the Lloydsville work, a conference, initiated by Magnuson, was held at the Bureau's experimental mine at Bruceton, Pennsylvania, to set up a test program to evaluate the pneumatic injection of dry fly ash as a mine-fire control technique. One purpose of these tests was to provide data for the proposed Lloydsville project. Plaintiff was not invited to this conference.

Using fly ash obtained from the West Penn powerplant, tests were conducted in October and November, 1967, by a chemical research engineer, Edwin Murphy, employed by the Bureau of Mines. These tests were highly successful and it was at this point that Magnuson knew that this would be an excellent method of fire control.

Among the things established by these tests were:

a) Contrary to expectations, no significant portion of the fine fly ash dissipated itself as dust.

b) The fly-ash barrier, instead of settling as expected, absorbed moisture and actually swelled a little.

c) Dry fly ash has a low angle of repose and piles up at a much flatter angle, making a wider, more effective barrier.

d) The angle of repose was not so low that roofing was prevented.

e) Pneumatically injected fly ash completely permeates rubble piles.

f) After the pile of fly ash reached the roof, the air pressure under which the fly ash was injected caused the fly ash to move laterally to expand the roofed area over a substantial distance all around the borehole. This resulted in a barrier that was of several feet in thickness at the roof.

Murphy had also conducted the experiments reported in RI 6453 (finding 8) in which mineral wool was pneumatically injected. He found that the pneumatic injection of dry fly ash was far superior to the techniques he had earlier investigated.

30. The evidence is that Magnuson perceived the claimed process in stages. Prior to the demonstration, Magnuson believed that injection of dry fly ash would result in plugging the borehole and that the use of air would feed the fire like a forge. The demonstration satisfied him that dry fly ash could be pneumatically injected without plugging. Calculations made subsequent to the demonstration indicated that the use of air would not be a problem. Both prior and subsequent to the demonstration, Magnuson was unaware of the angle of repose of aerated fly ash. Both prior and subsequent to the demonstration, Magnuson formed no conclusions as to what was happening to the fly ash in the mine cavity. Although Magnuson issued the Lloydsville specification in August 1967, it was not until the Bureau experiments in October 1967 that Magnuson was satisfied that the powdery fly ash would not simply dissipate and would, in fact, form a satisfactory barrier. It was also not until after these experiments that Magnuson realized that the fly ash would penetrate rubble

piles to block the flow of air and that the fly-ash barrier would provide subterranean support for the surface.

31. (a) The patent application was executed by the three applicants on September 18, 1967, and filed in the Patent Office on September 20, 1967.

(b) The claims were allowed by the Patent Office after an interview with the examiner and the presentation of an amendment submitting arguments regarding the patentability of the claims. These arguments included the assertion that fly ash, when used in the claimed method, would penetrate and block small cracks and crevices through which air would otherwise be supplied to the fire. Coextensive with this assertion, the limitation regarding fly-ash size was included in the claim to define a fly ash that would be of sufficiently small size to achieve that desirable end result. Neither the specification nor the arguments presented during prosecution indicate that the size of the fly ash must be exactly within the specified range. Nothing in the file wrapper indicates that the examiner was misled regarding the fly-ash size.

(c) Applicants' remarks in the amendment, filed August 13, 1968, regarding the Lloydsville contract, are ambiguous in that it is unclear whether applicants were asserting that they were the successful bidder on that project. To the extent that they were so asserting, that assertion was incorrect. However, the identity of the successful bidder was wholly immaterial to the argument being presented, which was that the claimed method was proposed for and used at Lloydsville. That argument was entirely correct to the best of applicants' knowledge.

(d) Although claim 1 does not expressly specify the angle of repose of the fly ash, aerated fly ash of the size specified in the claim would have an angle of repose of 8° to 10°.

32. The process of claim 1 differs from the pertinent prior art in the following respects:

1. The use of dry fly ash in controlling mine fires.

2. The injection of dry fly ash through a borehole into an underground mine cavity.

3. Injection of dry fly ash pneumatically.

4. The use of air, itself a source of additional oxygen, as the medium for injecting the fly ash into the mine.

5. Injecting fine fly ash, with sufficient volume and pressure of air, to carry the fine particles into the cracks and voids in the mine.

6. The use of a dry powdery material having a low angle of repose either to form a barrier in a mine cavity or to provide subterranean support to prevent surface subsidence.

33. (a) A review of the patents cited by the Patent Office during the prosecution of the patent application has not disclosed any error in the Patent Office's decision; specific findings as to each file wrapper reference, defendant having proposed none, is deemed unnecessary.

(b) The Lloydsville contract specification, published in mid-August 1967, is not prior art. A demonstration by plaintiff, using fly ash falling within the size range specified in the claims, took place prior to the drafting of that specification. The Lloydsville specification was drafted only after, and as a direct result of, that successful demonstration. Prior to August 1967, the inventors had determined that the fly ash should be of a size that 75% would pass a 325-mesh screen and that it, preferably, should meet ASTM-C-350. Fly ash, meeting that specification, would necessarily be of a size such that 90% would pass a 50-mesh screen.

34. (a) Bureau of Mines Report of Investigation 4808, dated October 1951, describes an underground coal gasification experiment during 1949–50, at Gorgas, Alabama. The object of the experiment was to obtain energy in the form of gas from underground coal by igniting a coal seam in which some passages had been mined and blowing air in contact with the burning coal face. Because the mined passages were so large that the gasifying air blown into the coalbed did not have sufficient direct contact with the coal to obtain good coal gasification, solid granular material was fluidized and injected by air down the borehole into the mine cavity until refusal, in order to fill the same and thus make the gasifying oxygen pass over the coal surface to react therewith. A sand barrier, which was formed by fluidizing sand and injecting the same down the borehole, was used to accomplish this result.

(b) Injection was accomplished by placing a pipe down a borehole into the mine cavity until it was about 1 foot above the bottom. Sand was then injected until the pipe plugged. The pipe was then raised and the process was continued until a barrier had been formed. A number of problems were encountered with the pipe plugging.

(c) When the gasification project was terminated, the underground fire was extinguished by pumping water into the underground cavity at a rate of 60 gallons per minute for 8 weeks to reduce the temperature from 1,000° F. to 220° F. This was a complete inundation of the fire with water. The Gorgas site was on the grounds of the Alabama Power Company which had a powerplant and fly ash very close to the project site. However, fly ash was not considered for extinguishing the fire.

35. The Schmidt et al patent, No. 2,710,232, was an outgrowth of the coal gasification project. (Finding 34.) The patent relates to a method of filling cavities with granular solids and, more particularly, to filling mined-out or burned-out cavities in an underground gasification mine with solid material. The only granular solids specifically mentioned are sand and earth. There is no mention of fly ash. The patent states that if the particles are too large, difficulties occasioned by excessively high fluidization velocities are encountered and, on the other hand, if the particles are too small, it is difficult to maintain a uniformly fluidized condition. The patent also warns that excessively large amounts of air give rise to excessive dispersion of the sand. Additional listed uses of the process include filling fissures and cracks in walls and floors, filling mold cavities with granular material, lining furnace walls with granular refractory material, and filling mined-out areas to prevent subsidence. The patent contains no suggestion that the described process might have utility in controlling or extinguishing mine fires.

36. (a) The Anderson et al patent, No. 3,152,842, discloses a pneumatic bulk tanker, such as those that are commercially available and commonly used to transport fly ash. It is directed primarily to apparatus and gives little indication of potential uses for the materials that the apparatus transports.

(b) Tankers of this type aerate the material in the tank to render it flowable. The aerated material then flows into a discharge line where additional air is supplied to discharge the material. By various adjustments, the tanker can be operated to discharge the material under various conditions ranging from a pressurized discharge, in which the material would issue from the hose as a cloud of dust, to, as in the case of fly ash, a stream of material having properties similar to a stream of water.

37. The pertinent art is the field of fire control in inactive or abandoned coal mines. The field is an old one, with those of ordinary skill possessing substantial experience in mine-fire control work. The mine-fire control group of the U.S. Bureau of Mines works with the states in controlling abandoned mine fires. Research in this field is regularly conducted by the Bureau and the Bureau has an experimental mine it uses to aid its research. Many of the Bureau personnel are trained mining engineers possessing a high degree of experience, skill, and expertise in this field. In view of the Bureau's active role in the control of fires in abandoned mines, its field personnel, together with those in corresponding positions at the state level, are representative of those ordinarily skilled in this art.

38. (a) On or about July 10, 1968, Magnuson submitted an invention report covering the pneumatic injection of dry fly ash to the Department of the Interior. Under section V.A. 1(a) of that report, Magnuson asserted a conception in June 1967; under section V.A. 1(b) of that report, he stated that he first communicated the concept to others in "July 1967 prior to July 19 test," a time subsequent to his meeting with Heavilon.

(b) By letter of July 18, 1968, the Assistant Solicitor, Branch of Patents, Department of the Interior, informed Magnuson that his disclosure was probably patentable and advised that a patent application would be prepared. In reaching his opinion, the Assistant Solicitor had made a prior art search and was aware of Schmidt et al Patent No. 2,710,232, Bulletin 590 (describing the prior art techniques discussed in finding 8), and Bureau publication RI 6453. The application was filed on September 9, 1968.

(c) In an amendment dated April 25, 1969, Magnuson inserted in his application copies of claims 1–5 from the patent in suit, requesting institution of an interference. No interference was declared, the examiner holding that these claims were barred to Magnuson by reason of a publication more than 1 year prior to Magnuson's filing date. Thereafter, Magnuson canceled those claims from his application and ultimately was granted patent No. 3,500,934, on March 17, 1970. The claims of that patent are limited to a method of pneumatically injecting an admixture of fly ash and either cement or swelling clays.

39. The patented method has been widely acclaimed by those in the mine-fire control field. It has received substantial publicity in the coal industry, based on interviews with Bureau of Mines personnel. Magnuson, in an address to the Annual Meeting, Coal Mining Institute of America, in 1968, described the method as "an important new tool for combating mine fires" and one having "great social benefit in addition to being effective and practical."

In his invention report to the Department of the Interior in July 1968, Magnuson described the method as having these advantages over the prior art techniques:

1. The material forms an impervious seal which is tight against the roof of the cavity.
2. The material does not shrink; in fact, its absorbs water and expands.
3. The process uses a waste material which is a disposal problem to the power companies.
4. The process does not use water which must be purchased or pumped and the use of which requires winter shutdown of operations.
5. The fly ash penetrates crevices and rubble more readily because of the fineness of the material and the air pressures used during injection.
6. More material per borehole can be injected. (Tests have shown an average of 50 tons per borehole compared to 7 to 20 tons per borehole with conventional flushing.)
7. Less drilling is required to inject a given amount of material.
8. The pneumatic injection is accomplished using commercially available trucks which can be obtained through competitive bidding.

40. The specification for the Monongahela City Mine Fire Control Project No. 20 provided:

* * * * *

10. *Description of Operations.* * * * The operation will consist of dry pressure injection at locations in the project area as designated by the Contracting Officer. * * *

11. Plan of Operations. * * *

* * * * *

Stage 4—*Drilling and casing boreholes.* Boreholes of 6-inch diameter shall be drilled from the surface into the mine openings. * * * These boreholes will be drilled for the purpose of dry pressure injections of a fly ash-air mixture into the underground mine voids. * * *

* * * * *

Stage 5—*Dry pressure injection.* A fly ash-air mixture shall be introduced into the mine voids by bulk pneumatic trailer tankers discharging through the casings installed in boreholes as a part of stage 4 so as to fill the voids with incombustible material. The dry pressure injection shall be carried out at pressures ranging from nearly 0 to 15 p.s.i.

* * * * *

13. *Description of Required Equipment, Services, and Materials.* * * *

* * * * *

Item 10—*Loading, transportation, and discharge of fly ash.* The work outlined under stage 5 of the plan of operations, and other work as designated by the Contracting Officer, will require the services of bulk pneumatic trailer tankers. * * * The tractor-trailer rigs must be capable of being loaded with dry fly ash at the Mitchell plant of the West Penn Power Company at New Eagle, Pa., transporting it to the project site, and discharging it into 4-inch casings through casing adapters equipped with 4-inch Kam-Lock couplings at line and tank pressures ranging from 0 to 15 p.s.i. * * * The fly ash will have a size distribution such that 90 percent will pass through a 50-mesh screen and 75 percent will pass through a 320-mesh screen. * * *

41. The fly ash used on this project was initially obtained from West Penn and later from the Elrama powerplant of the Duquesne Light Company. Fly ash from silo 33 at West

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Penn has a size distribution falling within the claimed ranges. There is no evidence regarding the physical specifications of the fly ash from Elrama.

The procedure followed at Monongahela City was the same as that employed earlier at Lloydsville. At Lloydsville, a mixture of air and fly ash of the claimed size was injected under pressure down boreholes to fill the mine shaft and form an airtight barrier which would prevent further subsidence of the surface. In addition to building a fly-ash barrier around the fire and filling the cracks and voids, fly ash was injected through boreholes drilled into the fire area itself to extinguish the fire.

Upon completion of the injection process, the boreholes were closed and sealed by filling them with dirt.

CONCLUSION

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that claim 1 of U.S. Patent No. 3,421,587 is valid and infringed. Accordingly, plaintiff is entitled to recover reasonable and entire compensation for unauthorized use by defendant, and judgment is entered to that effect. The extent of liability will be determined in further proceedings pursuant to Rule 131(c)(2).

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513 F. 2d 1399

CUMBERLAND MINERAL COMPANY, A KENTUCKY CORPORATION v. THE UNITED STATES

[No. 114-73. Decided April 16, 1975]

ON THE PROOFS

Eminent domain; taking; mineral rights; clay and sandstone.—In October 1935 defendant purchased land in Kentucky from the owner (Castle) for national forest purposes; the deed reserved to Castle, its successors, grantees and assigns, the mineral, oil, and gas in, upon and under the land in perpetuity. In December 1935 and December 1937, Castle deeded to plaintiff the reserved mineral, oil, and gas rights. Plaintiff seeks to recover a sum allegedly representing the value of clay and sandstone which defendant in 1970 and 1971 admittedly took from the said land and used in construction of

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the earth-filled Laurel River Dam. Defendant refused to compensate plaintiff, asserting that clay and sandstone are not minerals within the meaning of the term as used in the deed reservation, and, therefore, that these materials were the property of the United States. It is *held* (1) that neither clay nor sandstone is a mineral if the term is to be considered only from the scientific standpoint; (2) that when the word "mineral," as used in the subject reservation, is considered in the light of the circumstances surrounding the acquisition of the land by the Government for national forest purposes for the growing of trees, the reservation could not reasonably have been intended to cover and did not cover the sandstone and clay, which comprised about 75% of the subsurface of the land; and (3) that the sandstone and clay which defendant removed were the property of defendant. Plaintiff is not entitled to recover and the petition is dismissed.

Words and phrases; "mineral"; clay and sandstone.

[1] In the scientific sense of the term "mineral," neither sandstone (a rock) nor clay (a derivative of rock) is a mineral.

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Eminent domain; property interest or right subject to taking; land; mineral rights.

[2] The word "mineral," appearing in realty conveyances and reservations, is used in so many senses, dependent upon the context, that the ordinary definitions of the dictionery throw but little light upon its signification in a given case. *Northern Pac. Ry.* v. *Soderberg*, 188 U.S. 526 (1903). Therefore, in construing mineral reservations and conveyances, each determination must be made in the light of the language of the particular instrument, together with the circumstances and conditions existing at the time. Where the Government acquired by deed for forest purposes all rights of ownership in the surface and subsurface of the subject land, except that the deed reserved to the conveyor the mineral, oil, and gas in the land, and the subsurface of the land, consists mostly (about 75%) of clay and sandstone (which in the scientific sense are not minerals), to hold that the owner of the reserved mineral rights could exercise his ownership by removing all the clay and sandstone would wholly defeat the purpose of the conveyance to the Government and, therefore, could not reasonably have been within the contemplation of the parties.

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David E. Rodgers, attorney of record, and *James S. Tipton, Jr.*, for plaintiff. *Krames, Johnson, Rayson, Greenwood & McVeigh*, of counsel.

Gerald S. Fish, with whom was *Assistant Attorney General Wallace H. Johnson*, for defendant.

Opinion of Trial Judge

Before NICHOLS, KUNZIG, and BENNETT, *Judges.*

PER CURIAM: This case comes before the court on plaintiff's exceptions to the recommended decision filed by Senior Trial Judge Mastin G. White on September 13, 1974, pursuant to Rule 134(h), having been submitted to the court on oral argument and the briefs of counsel. Upon consideration thereof, since the court agrees with the said recommended decision,* as hereinafter set forth, it hereby affirms and adopts the same as the basis for its judgment in this case. It is therefore concluded that plaintiff is not entitled to recover and the petition is dismissed.

OPINION OF TRIAL JUDGE

WHITE, *Senior Trial Judge:* This is a "taking" case brought by the plaintiff under the portion of the fifth amendment to the Constitution which declares, "nor shall private property be taken for public use, without just compensation." The plaintiff sues for $551,874.77,[1] allegedly representing the value of clay and sandstone which the defendant admittedly took from certain land in Kentucky and used in the construction of the Laurel River Dam.

Both the plaintiff and the defendant claim ownership of the clay and sandstone in question, and the court is called upon to adjudicate these conflicting claims.

In the 1930's, the defendant was engaged in a large-scale program for the acquisition of lands to be used for national forest purposes. During the course of this program, the defendant purchased from The Castle Craig Coal Company, a Kentucky corporation, 26,158 acres of land located in Laurel, Whitley, and Pulaski Counties, Kentucky. The deed of conveyance was dated October 14, 1935. (For the sake of convenience, this land will usually be referred to hereafter in the opinion as "the Castle Craig land.")

Ever since its acquisition by the defendant, the Castle Craig land has been administered by the Forest Service of the U.S. Department of Agriculture as part of the national forest system. The land was initially incorporated in the

*The dissenting opinion of Judge Nichols follows the opinion of the trial judge which has been adopted by the court.

[1] The claim, as originally asserted in the petition, was for $500,000.

Cumberland National Forest, but in 1966 this forest was redesignated as the Daniel Boone National Forest.

The deed conveying the Castle Craig land to the defendant contained the following provision (among others):

> RESERVING, however, from the operation of this conveyance, unto the party of the first part [The Castle Craig Coal Company], its successors, grantees and assigns, the mineral, oil, and gas, in, upon and under the above described tracts of land, in perpetuity * * *.

By means of deeds dated December 10, 1935, and December 14, 1937, The Castle Craig Coal Company conveyed to the plaintiff, Cumberland Mineral Company, a Kentucky corporation, the mineral, oil, and gas which The Castle Craig Coal Company had reserved in conveying the Castle Craig land to the defendant on October 14, 1935. The plaintiff is still the owner of such interests.

Many years after acquiring the Castle Craig land, the defendant (acting through the Corps of Engineers, Department of the Army) constructed the Laurel River Dam on a portion of such land. This dam was an earth-filled dam, and two types of material were needed in its construction, *i.e.*, an impervious material for the core of the dam and a covering material to give the dam stability. A clay deposit, known as Borrow Area C and located about a mile from the dam site (in a straight line), was selected as the source of the impervious material. Sandstone cliffs located on opposite sides of the Laurel River in the vicinity of the dam site, and known as Quarry Areas 2 and 3, were selected as the sources of the covering material.

Approximately 516,362 cubic yards of clay were removed from Borrow Area C by the Corps of Engineers and used as the impervious core of the Laurel River Dam. Approximately 2,228,000 cubic yards of sandstone were removed from Quarry Areas 2 and 3 and used as the covering material in the form of riprap. These activities occurred in 1970 and 1971.

The dam site, Borrow Area C, and Quarry Areas 2 and 3 were all located on the Castle Craig land. Thus, the clay and sandstone previously mentioned as having been removed and used in the construction of the Laurel River Dam were

taken by the Corps of Engineers from the Castle Craig land.

When the plaintiff learned that the Corps of Engineers was using clay and sandstone from the Castle Craig land in the construction of the Laurel River Dam, the plaintiff approached the Corps of Engineers and requested compensation for the clay and sandstone in question. However, the Corps of Engineers refused to compensate the plaintiff for the clay and sandstone, on the asserted ground that such materials were the property of the Government and not the property of the plaintiff. The present litigation followed.

The primary question to be decided by the court is whether the clay and sandstone which the defendant removed from the Castle Craig land and used in the construction of the Laurel River Dam were covered by, or outside the scope of, the reservation of "the mineral, oil, and gas, in, upon and under" the Castle Craig land, as contained in the deed of October 14, 1935, conveying such land to the defendant.

Neither clay nor sandstone is a mineral, if the term "mineral" is to be considered only from the scientific standpoint. A mineral, in the scientific sense of that term, is a chemical element or compound occurring naturally as a product of inorganic processes. Any mixture is outside the mineral category, in the true sense of the term "mineral."

Rocks are mixtures and, therefore, are outside the mineral category. Sandstone is a sedimentary rock. Shale and limestone are two other types of sedimentary rock. Clay is a soil deposit that is derived from the decomposition of rock, principally shale. Accordingly, neither sandstone (a rock) nor clay (a derivative of rock) is a mineral, in the scientific sense of the term "mineral."

The courts, however, in construing mineral reservations and conveyances in connection with realty transactions, have sometimes determined that, under the circumstances of particular cases, the word "mineral" was used in a sense broader than the scientific one, so as to include material outside the scientific meaning of the term "mineral." For example, it was held in one case that limestone, a rock, was included in a conveyance of "All minerals, coal, clays, spars, oil-gases and every other kind and character of *mineral cement*, oil, gases * * * in on and under" certain land (emphasis supplied),

since portland cement is generally manufactured from limestone. *Rudd* v. *Hayden*, 97 S.W. 2d 35 (Ky. 1936). On the other hand, it has been held in other cases that limestone was not included within the scope of a reservation of "all the metals and minerals of every kind and character whatsoever in and underlying the entire body of" certain land (*Beury* v. *Shelton*, 144 S.E. 629 (Va. 1928)), or within a reservation of 1/16 of the oil and gas, 1/2 of the fireclay, and "a 1/2 interest in all other minerals on" certain land (*Little* v. *Carter*, 408 S.W. 2d 207 (Ky. 1966)).

It has been held that shale, a rock, was included within a conveyance of "all the coal, ores, and other minerals and metals in, under, and upon" certain land (*McCombs* v. *Stephenson*, 44 So. 867 (Ala. 1907)). On the other hand, it has been held that clay, a soil deposit derived mainly from the decomposition of shale—and one of the materials involved in the present litigation—was not included within a conveyance of a one-half interest in "all of the oil, gas and other minerals in and under" certain land (*Hans* v. *Great Bend Brick & Tile Co.*, 241 P. 2d 475 (Kan. 1952)), or within a conveyance of "all the coal and other minerals of every kind and description, except gas and oil in and underlying" certain land (*Rock House Fork Land Co.* v. *Raleigh Brick & Tile Co.*, 97 S.E. 684 (W. Va. 1918)).

As for sandstone, the other material involved in the present case, it was held in *Kalberer* v. *Grassham*, 138 S.W. 2d 940 (Ky. 1940), that a sandstone quarry was included within a conveyance of "all the minerals of every kind and character, except the coal and natural gas and coal oil," in a certain tract of land. On the other hand, it was held in *United States* v. *Sparkman* (E.D. Ky. 1962; Civil Action No. 1012; unreported) that where the Government acquired a tract of land for national forest purposes but subject to a reservation of "the mineral, gas and oil rights for a period of twenty-five (25) years," the reservation did not include "sandstone * * * which lies so close to the surface * * * that the removal of same will necessarily destroy the surface overlying such deposits."

The decisional diversities previously cited will illustrate why the Supreme Court said in *Northern Pacific Railway*

Co. v. *Soderberg*, 188 U.S. 526, 530 (1903), that "The word 'mineral' is used in so many senses, dependent upon the context, that the ordinary definitions of the dictionary throw but little light upon its signification in a given case." Therefore, in construing mineral reservations and conveyances, "each determination must be made in the light of the language of the particular instrument together with the circumstances and conditions existing at the time." *Dierks Lumber & Coal Co.* v. *Meyer*, 85 F. Supp. 157, 162 (W.D. Ark. 1949).

When the meaning of the word "mineral," as used in the reservation of "the mineral, oil, and gas, in, upon and under" the Castle Craig land, is considered in the light of the circumstances surrounding the acquisition of that land by the Government from the Castle Craig Coal Company, it is apparent that the parties to the transaction of October 14, 1935, could not reasonably have understood that The Castle Craig Coal Company was reserving to itself the sandstone and clay in such land.

One of the significant circumstances to be considered is that the Castle Craig land was purchased by the Government as part of a large-scale program for the acquisition of land to be used for national forest purposes, *i.e.*, for the growing of trees. Another significant circumstance is that the geological formations in the Kentucky region containing the Castle Craig land are composed principally of sandstone strata, to the extent of approximately 75 percent, the remainder being mainly strata of shale and its derivative, clay.

It is obvious from the facts outlined in the preceding paragraph that if the plaintiff, as successor in interest to The Castle Craig Coal Company, were the owner of the sandstone and clay in the Castle Craig land and were to exercise its right of ownership by removing all of these materials, about the only thing that would be left for the Government would be a vast chasm, thus wholly defeating the purpose of the October 14, 1935, transaction whereby the ownership of the Castle Craig land was transferred from The Castle Craig Coal Company to the Government in order that such land could be used by the purchaser for the growing of trees. Such a situation could not reasonably have been within the contemplation of the parties.

It must be concluded, therefore, that the reservation of "the mineral" in the Castle Craig land, as set out in the deed of October 14, 1935, was not intended to cover, and did not cover, the sandstone and clay in such land.

In this connection, it is at least worthy of mention that during the period of approximately 35 years which intervened between the time when the plaintiff acquired the mineral, oil, and gas in the Castle Craig land and the time when the defendant began to remove sandstone and clay from such land and to use these materials in the construction of the Laurel River Dam, the plaintiff did not make any attempt to extract or dispose of sandstone or clay from the Castle Craig land. The only sort of development in the Castle Craig land attempted by the plaintiff under the reservation of "the mineral, oil, and gas" was the drilling of several wells for oil, only one of which produced oil in commercial quantities.

It has previously been indicated that the only cited cases which specifically involved the question of whether clay was covered by a mineral reservation or conveyance gave negative answers to this question. However, it is necessary that special consideration be given to the case of *Kalberer* v. *Grassham*, 138 S.W. 2d 940 (Ky. 1940), which held that a sandstone quarry was within the scope of a mineral conveyance.

In *Kalberer* v. *Grassham*, a man and his wife conveyed to a mineral company "all the minerals of every kind and character, except the coal and natural gas and coal oil, including the right of way to open said minerals in" a certain tract of land, with the grantors retaining "as their own, all the surface of the said land, and all the coal or natural gas or coal oil in or under said land." A sandstone quarry was located on the land.

Subsequently, a controversy arose between Kalberer, as successor in interest to the grantors, and Grassham, as successor in interest to the grantee, over the question of whether the mineral conveyance included the sandstone quarry on the land.

The Court of Appeals of Kentucky said (138 S.W. 2d at 943) that "the word 'mineral' as commonly used in mineral deeds, may or may not include rock of any character—

depending upon the language used in the grant and the surrounding circumstances of the parties"; and that the mineral deed which the court was construing "expressly excepted coal, natural gas and coal oil, the character or type of minerals more likely to be found and more commonly known to exist in that community, and if the reservation be extended by implication to rock quarries and other like substances, then practically everything would be reserved and nothing granted." The court also emphasized the fact—which the court inferred from the surrounding circumstances—that the grantor was aware that the grantee was engaged in the business of producing stone (among other things). In the light of the surrounding circumstances, the court concluded that the stone quarry was included in the mineral conveyance.

Kalberer v. *Grassham*, *supra*, is readily distinguishable on the facts from the present case. There, a company engaged in the business of producing stone (among other things) purchased "all the minerals"—except for any coal, natural gas, or coal oil—in a certain tract of land, with the seller retaining "all the surface of the said land, and all the coal or natural gas or coal oil in or under said land"; and the court concluded that the parties reasonably intended that the purchaser should receive—and the seller should not retain—a sandstone quarry located on the land. Obviously, the sandstone quarry was more properly within the scope of the grant of "all the minerals" than it was within the scope of the retention of "all the surface" of the land involved in *Kalberer* v. *Grassham*.

In our case, the Government purchased all rights of ownership in the surface and subsurface of the Castle Craig land so that such land could be used for the growing of trees, except that the seller reserved "the mineral, oil, and gas, in, upon and under" the land. If the reservation involved here were to be construed as including the sandstone and clay formations in the subsurface of the Castle Craig land (comprising more than 75 percent of the subsurface formations), "then practically everything would be reserved and nothing granted" (*Kalberer* v. *Grassham*, *supra*, 138 S.W. 2d at 943). Such a construction of the reservation would be unreason-

able and, as previously stated, wholly defeat the purpose of the transaction whereby the Government acquired the Castle Craig land for national forest purposes. Under these circumstances, the subsurface formations essential to support the forest were more properly within the scope of the grant of the land than they were within the scope of the reservation of "the mineral" in the land.

For the reasons previously stated, it is my opinion that the reservation of "the mineral" in the Castle Craig land, as set out in the deed of October 14, 1935, did not include the sandstone and clay in the Castle Craig land; and that the sandstone and clay which the defendant removed from the Castle Craig land and used in the construction of the Laurel River Dam were the property of the defendant and not the property of the plaintiff, as successor in interest to The Castle Craig Coal Company.

The conclusion stated in the preceding paragraph makes it unnecessary to consider other questions to which the parties have devoted considerable attention in their briefs. One of these is the question of the proper measure of damages where the Government has taken mineral deposits belonging to a private person. Another is the question of the effect of the filing in 1973 by the Government of a suit in the United States District Court for the Eastern District of Kentucky to acquire through condemnation the reserved mineral, oil, and gas in the portion of the Castle Craig land where the Laurel River Dam and its upstream reservoir are located. Quarry Areas 2 and 3, from which sandstone was removed by the defendant for use in the construction of the Laurel River Dam, are within the 2,490.7-acre parcel involved in the condemnation suit. However, the removal of sandstone from Quarry Areas 2 and 3 had been completed, and the use of such material in the construction of the Laurel River Dam had ceased, prior to the filing of the condemnation suit.

As the sandstone and clay which the defendant removed from the Castle Craig land and used in the construction of the Laurel River Dam were not reserved minerals subject to the plaintiff's ownership, the plaintiff is not entitled to recover in the present case. Accordingly, the petition should be dismissed.

Dissenting Opinion by Judge Nichols

NICHOLS, *Judge*, dissenting:

My first or threshhold objection to the trial judge's able opinion is that he fails to state what law governs the interpretation of the deed involved, which relates to Kentucky land. Plaintiff urges it is definitely the case law of Kentucky, and I think it is right. *United States* v. *Certain Property, Etc.*, 344 F. 2d 142 (2d Cir. 1965). We have recently refused to apply Massachusetts law to a lease to the Federal government of Massachusetts property, indicating, however, that this turns on a lease being more like a contract than like a deed. *Keydata Corp.* v. *United States*, 205 Ct. Cl. 467, 504 F. 2d 1115 (1974). The trial judge straddles the problem but pays special attention to Kentucky cases.

Perhaps it is true that most cases considered, in Kentucky courts and others, actually turn on context indications of what the parties were thinking about, the term "mineral" itself having no fixed meaning at law. According to *Webster's Unabridged* (1968 ed.) the term definitely does include building stone and clay, as well as gravel and sand. In the circumstances, it appears to me the proper canon of interpretation is that the common meaning is presumptively the legal meaning, in Kentucky and elsewhere, unless a contrary intent appears. *Webster's* is a good source for common speech, which the trial judge has ignored.

The trial judge quotes from *Northern Pacific Ry. Co.* v. *Soderberg*, 188 U.S. 526, 530 (1903), but the decision taken as a whole tends against his decision here. It involved a clause in a Government land grant to the railroad, excluding "all mineral lands." The issue was whether this excluded a quarter section chiefly valuable for a ledge of granite suitable to be quarried. In construing such a grant, obviously full adherence to the dictionary meaning of "mineral" would be impossible as excluding all lands. Nevertheless the Court calls attention to that meaning, and to some English decisions equally broad. It derives light from other sources as to Congressional intent, too varied to be summarized here. It comes down solid against the railroad: thus granite lands, at least, are "mineral lands". This would be *a fortiori* for any exclusion, not of entire quarter sections, but just of the

mineral itself, where a broad construction would not frustrate the grant entirely.

I am willing to go down the trial judge's road, analyzing the surrounding circumstances to ascertain the intent of the parties, and it leads me to a different result.

Defendant by the involved deed acquired 26,158 acres for a national forest. The grantor was a coal company. It agreed to exercise its reserved right in accord with rules and regulations prescribed by the Department of Agriculture, and these required it to pay for all trees it might remove.

Sandstone and clay are not normally articles of commerce and are normally extracted from the ground only when, as here, they are wanted for local construction purposes. The feeling seems to be that the intent was only to reserve minerals of commercial importance, such as coal, the grantor's business concern, or petroleum. That seems to me a fleeting and uncertain test. Suppose there were uranium in the rock. Was it excluded because it had no commercial value on the date of the grant, or included because it has commercial value on the date of the court's judgment?

It appears to me from the findings a reasonable inference that the Government wished to pay the lowest price and in order to do so, decided to take a chance on future mineral exploitation in the area. The possibility would have appeared very slim that extraction for either commercial or local construction purposes would seriously interfere with the intended use over any substantial portion of the tract, and the grantor was making commitments to mitigate injury therefrom if any should occur. As to minerals in no commercial demand, the injury was predictably slight because any use for local construction demands would be sporadic and minimal in quantity.

It appears to me that anyone who was called on to approve the title in 1935 (the Attorney General?) would have had to consider the dictionary meaning and assume it to be the legal meaning unless shown otherwise: that anything the clause might include, it did include. Otherwise he would be required to guess at the parties' intent. And the deal could not have been justified on the Government side unless the price was low enough to make it beneficial to the public interest even

on the most unfavorable assumption. The grantor's reservation should have made it possible to grow many more acres of trees than could have been grown on the amount of land obtainable by buying a full fee simple, with expenditures of the same amount of money. If the United States had wanted to use the granted premises for, *e.g.*, a military post or a National Park, the reservation of such minerals as sandstone and clay would have been more difficult to reconcile with the intended use, and the argument that minerals not of commercial importance were excluded, would have had more persuasive force.

The decision throws the reservation language in this deed into such uncertainty of meaning that it will be impossible to use it in future deeds.

In my view the non-commercial character of the sandstone and clay deposits should have its effect, not on entitlement, but on quantum of recovery.

I would enter judgment for plaintiff on the trial judge's findings, and remand to the trial division for further proceedings under Rule 131(c), to determine quantum.

FINDINGS OF FACT

1. (a) The plaintiff, Cumberland Mineral Company, is a corporation that was organized under the laws of the State of Kentucky in 1935.

(b) The plaintiff owns the mineral, oil, and gas in, upon, and under 26,158 acres of land located in Laurel, Whitley, and Pulaski Counties in the State of Kentucky.

2. Prior to the year 1935, The Castle Craig Coal Company, a Kentucky corporation, was the owner in fee of 26,158 acres of land located in Laurel, Whitley, and Pulaski Counties in the State of Kentucky.

3. (a) By means of a deed dated October 14, 1935, and recorded in Deed Book 79, page 379, in the Office of the County Court Clerk for Laurel County, London, Kentucky, The Castle Craig Coal Company conveyed to the defendant, for a purchase price of $209,264, the 26,158 acres of land mentioned in finding 2. (For the sake of convenience, this land will usually be referred to hereafter in the findings of fact as "the Castle Craig land.")

(b) The deed conveying the Castle Craig land to the defendant contained the following provision (among others):

> RESERVING, however, from the operation of this conveyance, unto the party of the first part [The Castle Craig Coal Company], its successors, grantees and assigns, the mineral, oil, and gas, in, upon and under the above described tracts of land, in perpetuity * * *.

(c) The deed provided that operations under the mineral reservation should be carried on in accordance with rules and regulations prescribed by the Secretary of Agriculture.

(d) The acquisition of the Castle Craig land by the defendant was part of a large-scale program which the Government was conducting in the 1930's for the acquisition of land to be used for national forest purposes. Since the acquisition of the Castle Craig land by the defendant, such land has been administered by the Forest Service, U.S. Department of Agriculture, as part of a national forest. The original name of this national forest was Cumberland National Forest, but in 1966 it was redesignated as the Daniel Boone National Forest.

4. (a) On December 10, 1935, The Castle Craig Coal Company purported to convey to the plaintiff "the oil, gas and all minerals whatsoever on, in and underlying the surface of" the Castle Craig land. The deed mentioned in the preceding sentence was recorded in Deed Book 79, page 551, in the Office of the County Court Clerk for Laurel County, London, Kentucky.

(b) So that all interests reserved by The Castle Craig Coal Company were transferred to the plaintiff, two additional deeds of conveyance were executed. The first was executed on December 10, 1935, and purported to convey to the plaintiff "the oil, gas and all minerals whatsoever on, in and underlying" certain of the Castle Craig land located in Whitley County. The additional deed of December 10, 1935, was recorded in Deed Book 133, page 209, in the Office of the Whitley County Court Clerk.

(c) The second additional deed was executed December 14, 1937, and purported to convey to the plaintiff "the minerals of every kind, including gas and oil in, on and under" certain

named tracts of the Castle Craig land located in Laurel, Whitley, and Pulaski Counties in the State of Kentucky. The additional deed of December 14, 1937, was recorded in Book 137, page 495, in the Office of the Whitley County Court Clerk; also in Book 113, page 334, in the Office of the Pulaski County Court Clerk; and also in Book 137, page 421, in the Office of the Laurel County Court Clerk.

(d) The plaintiff is still the owner of the interests conveyed by the deeds referred to in the preceding paragraphs of this finding.

5. (a) In 1970, the defendant, acting through the Corps of Engineers, Department of the Army, began the construction of an earth-filled dam across the Laurel River in Kentucky for the purpose of impounding water in the interest of flood control, the generation of electric power, and other related purposes. The dam is located upon a portion of the Castle Craig land, in an isolated area about 19.5 miles from Corbin, Kentucky, about 22 miles from London, Kentucky, and about 35 miles from Williamsburg, Kentucky. When the reservoir extending upstream from the dam is filled, it will cover approximately 6,000 acres and will have approximately 200 miles of shoreline.

(b) Two types of material were needed for the construction of the earth-filled dam mentioned in paragraph (a) of this finding—an impervious material for the core of the dam and a covering material to give the dam stability. A clay deposit, known as Borrow Area C and located about a mile from the dam site in a straight line, or about 4 miles over the haul road that was built for the purpose, was selected as the source of the impervious material. Sandstone cliffs located on opposite sides of the Laurel River in the vicinity of the dam site, and known as Quarry Areas 2 and 3, were selected as the sources of the covering material.

(c) Approximately 516,362 cubic yards of clay were removed from Borrow Area C and used in the construction of the Laurel River Dam as the impervious core of the dam.

(d) Approximately 2,228,000 cubic yards of sandstone were removed from Quarry Areas 2 and 3 and used in the construction of the Laurel River Dam as the covering material in the form of riprap.

(e) The dam site, Borrow Area C, and Quarry Areas 2 and 3 were located on—and the clay and sandstone referred to in the preceding paragraphs of this finding were removed from—the Castle Craig land, as to which the plaintiff owns the mineral, oil, and gas.

6. Borrow Area C and Quarry Areas 2 and 3 were located in rough terrain, approximately 2 miles from the nearest graded road.

7. (a) Borrow Area C was a 41.36-acre parcel of land. In order to remove clay from Borrow Area C for use in the construction of the Laurel River Dam, it was first necessary to clear the timber from the area and to recover all the merchantable timber for the Forest Service, which had title to the timber. Then the area had to be grubbed in order to remove all stumps and all roots that were 1 inch in diameter, or larger. After that, the organic matter and the top soil, totalling approximately 108,450 cubic yards, had to be stripped from the surface of the area and stockpiled for future use. Following the removal of the clay that was used in the construction of the Laurel River Dam, it was necessary to regrade Borrow Area C in order to eliminate any steep slopes, to respread the top soil and organic matter over the area, and to reseed the area. The cost of clearing the timber from Borrow Area C was $29,365; the cost of grubbing the area was $22,748; and the cost of stripping the top soil and organic matter, and later replacing it, was $70,492.

(b) Prior to the commencement of the Laurel River Dam project, the nearest paved road to Borrow Area C was approximately 2 miles away, and the only access to the borrow area was over a Forest Service fire trail.

(c) As there was no road in the vicinity of Borrow Area C, it was necessary to construct a two-lane, unsurfaced haul road from Borrow Area C to the site of the Laurel River Dam in order to transport clay from Borrow Area C to the dam site. This road was about 4 miles in length and was constructed at a cost of $96,651.61.

8. (a) In order to remove sandstone from Quarry Areas 2 and 3 for use in the construction of the Laurel River Dam, it was necessary to clear the timber from the two areas (Quarry Area 2 contained approximately 11.5 acres and

Quarry Area 3 contained approximately 15.7 acres), and to salvage all the merchantable timber for the Forest Service. Then it was necessary to remove the overburden above the sandstone that was suitable for use as riprap, and to place the overburden in designated spoil areas. The overburden consisted mostly of shale, but there was also some earth and some weathered sandstone that was not suitable for use as riprap. The overburden varied greatly in depth, up to a maximum of from 60 to 65 feet.

(b) The cost of removing overburden from Quarry Area 3, which represented less than half of the total acreage of the two quarry areas, was $363,865.

(c) The cost of removing the overburden from Quarry Area 2 is not disclosed by the evidence in the record.

(d) Prior to the commencement of the Laurel River Dam project, there was no access by road to Quarry Areas 2 and 3.

9. (a) The Corps of Engineers removed clay and sandstone from the Castle Craig land, and used these materials in the construction of the Laurel River Dam, without obtaining or seeking the permission of the plaintiff. These activities of the Corps of Engineers occurred in 1970 and 1971.

(b) When the plaintiff learned that the Corps of Engineers was using clay and sandstone from the Castle Craig land in the construction of the Laurel River Dam, the plaintiff approached the Corps of Engineers and requested that the plaintiff be compensated for the clay and sandstone in question. However, the Corps of Engineers refused to compensate the plaintiff for the clay and sandstone, on the asserted ground that the clay and sandstone were the property of the Government and not the property of the plaintiff.

(c) The defendant has never made any payment to the plaintiff as compensation for the clay and sandstone that were taken from the Castle Craig land by the defendant and used in the construction of the Laurel River Dam.

10. The plaintiff has never attempted to extract or dispose of any sandstone or clay from the Castle Craig land since acquiring mineral interests in such land.

11. (a) Except for the places from which sandstone and clay were removed by the defendant for use in the construction of the Laurel River Dam, there are no sandstone quarries

or clay removal pits in the Castle Craig land, and there is no evidence of past quarrying or clay removal operations in such land.

(b) Four sandstone quarries, from which material was removed in the past, have been identified within a few miles of the Laurel River Dam. However, none of these quarries is currently productive, although stone is available for sale at one quarry and some stone is stockpiled at another quarry.

12. The only development activity attempted by the plaintiff on the Castle Craig land since acquiring mineral interests in such land has consisted of the drilling of several wells for oil, only one of which produced oil in commercial quantities.

13. The geological formations in the Kentucky region containing the Castle Craig land are composed principally of flat-lying strata of sandstone (approximately 75 percent), with variable amounts of shale strata and clay (aggregating approximately 25 percent).

14. (a) A mineral, in the scientific sense of that term, is a chemical element or compound occurring naturally as a product of inorganic processes. Any mixture is outside the mineral category, in the true sense of the term "mineral."

(b) Rocks are mixtures and, therefore, are outside the mineral category.

(c) Sandstone and shale are sedimentary rocks. (Limestone is the third type of sedimentary rock.)

(d) Clay is a soil deposit that is derived from the decomposition of rock, principally shale, and is characterized by a relatively high degree of plasticity.

(e) Neither sandstone nor clay is a mineral, in the scientific sense of the term "mineral."

15. Both sandstone and clay have characteristics that make them suitable for commercial use in certain situations, where a demand exists and the costs of extraction and of transportation to the place of utilization are not excessive. When developed for commercial use, sandstone and clay are customarily referred to as falling within the category of "ores" or "industrial minerals."

16. (a) Virtually any quality of sandstone is suitable for use as fill in highway construction.

(b) Sandstone of a quality that can withstand the effects of weathering and of immersion in water is suitable for use as riprap in the construction of earthen dams or in connection with projects for the improvement of rivers or harbors.

(c) Sandstone of the best quality, when found in evenly bedded strata of the proper thickness, is suitable for use as dimension stone in the construction of bridges, houses, and other structures.

17. (a) Virtually any quality of clay is suitable for use as fill in the construction of highways or earthen dams, particularly where fill of an impervious nature is needed.

(b) Many clay deposits are of a quality that is suitable for use in the making of bricks. The color of bricks made from clay depends principally upon the type of clay that is used in the brick-making process, but the color can be affected to some extent by the intensity of the heat when the brick is fired. Most of the clay of brick-making quality in the Kentucky region containing the Castle Craig land produces the common type of red bricks. Such bricks are considered to be less desirable, and they are less expensive, than bricks of a lighter color.

18. (a) All of the sandstone which the defendant took from the Castle Craig land and used in the construction of the Laurel River Dam was suitable for use as fill in road-building operations; and all of it was also of a quality that was suitable for use—and it was actually used—as riprap in an aqueous environment.

(b) A small percentage of the sandstone which the defendant took from the Castle Craig land and used in the construction of the Laurel River Dam was evenly bedded and of fairly uniform thickness, with thin laminae allowing for easy removal of slabs, and would have been suitable for use as dimension stone. However, most of the sandstone which the defendant removed from the Castle Craig land and used in the construction of the Laurel River Dam would not have been suitable for use as dimension stone because it was jointed, or fractured, or too thick, or of uneven thickness.

(c) Sandstone that is suitable for use as riprap in an aqueous environment is more valuable—where there is a commercial market for it—than sandstone that is suitable

for use only as fill; and sandstone that is suitable for use as dimension stone is more valuable—assuming a commercial market—than sandstone that is suitable for use as riprap in an aqueous environment but not for use as dimension stone.

19. (a) All the clay which the defendant removed from the Castle Craig land and used in the construction of the Laurel River Dam was suitable for use—and it actually was used—as fill.

(b) All the clay which the defendant removed from the Castle Craig land and used in the construction of the Laurel River Dam was suitable for use in the manufacture of commercial-type facing bricks having an orange, tan, or buff color. The quality of such clay for brick-making purposes was superior to that of most of the clay deposits in the same region of Kentucky.

(c) Clay suitable for use in the manufacture of bricks having an orange, tan, or buff color is more valuable—where there is a commercial market for it—than clay that is suitable only for the manufacture of red bricks.

(d) The only brick manufacturer identified in the general vicinity of the Laurel River Dam is the Corbin Brick Company, owned by Hiram Begley, at Woodbine, Kentucky, approximately 2.5 miles south of Corbin, Kentucky, and approximately 21 miles from the dam site.

20. (a) A cubic yard of sandstone weighs approximately 1.9 tons.

(b) A cubic yard of brick-making clay weighs approximately 1.7 tons.

21. Quarry Areas 2 and 3 have been inundated by the Laurel River Reservoir.

22. Because of the isolated locations of the clay and sandstone deposits involved in the present litigation, the distances between such locations and places of possible utilization of the clay and sandstone, the high cost that would have been involved in the construction of haul roads over rough terrain from the nearest graded road to such locations, the high cost that would have been involved in removing the overburden above the clay and sandstone deposits, and the

more ready availability of great quantities of similar substances elsewhere, there was no commercial market at the time for the clay or for the sandstone which the defendant removed from the Castle Craig land and used in the construction of the Laurel River Dam.

23. (a) On March 22, 1973, the United States filed in the U.S. District Court for the Eastern District of Kentucky a condemnation suit entitled *United States* v. *2,490.70 Acres of Land, More or Less, Situate in Laurel and Whitley Counties, State of Kentucky, Etc.*, Docket No. 2215, the purpose of the suit being to acquire through condemnation the mineral, oil, and gas which The Castle Craig Coal Company reserved in 2,490.7 acres of the Castle Craig land when such land was conveyed to the United States on October 14, 1935.

(b) The 2,490.7 acres of land involved in the condemnation suit mentioned in paragraph (a) of this finding comprise the site of the Laurel River Dam and its upstream reservoir.

(c) Quarry Areas 2 and 3, from which sandstone was removed by the defendant for use in the construction of the Laurel River Dam, are within the area involved in the condemnation suit referred to in paragraph (a) of this finding. Borrow Area C, from which the defendant removed clay for use in the construction of the Laurel River Dam, is outside the area involved in the condemnation suit.

(d) The removal of sandstone and clay from the Castle Craig land by the defendant had been completed, and the use of these materials in the construction of the Laurel River Dam had ceased, prior to March 23, 1973, when the condemnation suit was filed by the United States.

24. The sandstone and clay which the defendant took from the Castle Craig land and used in the construction of the Laurel River Dam were not minerals within the scope of the reservation of "the mineral, oil, and gas," as set out in the deed of October 14, 1935, whereby the Castle Craig land was conveyed to the defendant; and such sandstone and clay were not the property of the plaintiff, but were the property of the defendant.

Conclusion of Law

CONCLUSION OF LAW

Upon the foregoing findings of fact and opinion, which are adopted by the court and made a part of the judgment herein, the court concludes as a matter of law that the plaintiff is not entitled to recover, and the petition is dismissed.

ORDERS

No. 777–71. JANUARY 3, 1975

Arcata National Corporation

Eminent domain; legislative taking; just compensation; attorney, appraisal and/or litigation fees; Redwood National Park.—Pub. L. 90–545, approved October 2, 1968, 82 Stat. 931, 16 U.S.C. §§ 79a–79j, established a Redwood National Park in Del Norte and Humboldt Counties, California; the park included property formerly owned by plaintiff. The appropriation of such property for park purposes was characterized in *Drakes Bay Land Co.* v. *United States*, 191 Ct. Cl. 389, 408, 424 F. 2d 574, 584 (1970), as a "pure legislative taking." Plaintiff seeks to recover, under Count I of its petition, just compensation from defendant for the value of the property taken from it by legislative fiat. In addition, plaintiff seeks to recover under the Uniform Relocation Assistance and Land Acquisition Policies Act of 1970, Pub. L. 91–646, 84 Stat. 1906, 42 U.S.C. § 4654, the litigation expenses incurred as a result of the proceedings in this court. Under Count II, plaintiff seeks to recover severance damages and under Count III it seeks to recover inverse condemnation damages resulting from enactment of said law. By Order of the court, based on a stipulation of the parties, Counts II and III were severed from trial of Count I and further proceedings thereon were reserved for subsequent action, if necessary. Following trial, Trial Judge Thomas J. Lydon on July 25, 1974 issued a recommended decision in which he concluded (1) that plaintiff is entitled to judgment against defendant on Count I for the taking on October 2, 1968 by defendant of plaintiff's land, with improvements and standing timber thereon, in the sum of $38,882,251.50, together

with simple interest as a part of just compensation at the rate of 6.6% per annum from October 2, 1968 until the date of payment of the judgment; and (2) that plaintiff is not entitled to recover reasonable attorney, appraisal and/or litigation fees actually incurred by plaintiff because of the proceedings in this case. On January 3, 1975 the court issued the following order:

"Following the filing of findings of fact, an opinion, and recommended conclusions of law by Trial Judge Thomas J. Lydon on July 25, 1974, this case comes before the court on a stipulation of the parties filed December 30, 1974, signed on behalf of the plaintiff and the defendant by the respective attorneys of record. The stipulation, resulting from the submission by plaintiff of a written offer of settlement to the Attorney General, states that plaintiff's offer of settlement was duly accepted by defendant, whereby plaintiff agreed to accept the sum of $35,382,251.50, together with simple interest thereon at the rate of 6.6 percent per annum from October 2, 1968, to date of payment, in full settlement of all claims set forth in the First and Second Counts, as well as in the Ad Damnum clauses, of the petition, with no claim being made relative to the Third Count of said petition since no additional land to which said Count is directed has been taken from plaintiff by defendant since October 2, 1968, and the defendant consented to the entry of judgment in the amount and manner set out above.

"IT IS THEREFORE ORDERED that judgment be and the same is entered for the plaintiff in the sum of thirty-five million three hundred eighty-two thousand two hundred fifty-one dollars and fifty cents ($35,382,251.50), together with simple interest thereon at the rate of 6.6 percent per annum from October 2, 1968, until date of payment, provided that plaintiff may obtain payment of such award upon the tender, if requested by defendant, of quitclaim deeds to all or any part of the taken lands suitable for recording in the office of the County Recorder of Humboldt County, California.

"IT IS FURTHER ORDERED that the Third Count of the petition be and the same is dismissed without prejudice."

No. 267–70. JANUARY 10, 1975

General Dynamics Corporation

Contracts; finality of administrative decision on amount of recovery; scope of judicial review; Government counterclaim.—On January 10, 1975 the court issued the following order:

Before COWEN, *Chief Judge*, DAVIS and BENNETT, *Judges*.

"This case comes before the court on the plaintiff's motion to dismiss the defendant's counterclaim and also to dismiss the defendant's 'appeal' from the decision of the ASBCA on the matter of quantum. The court has considered the briefs filed by the parties and the oral argument.

"1. On the matter of quantum, the court is clearly of the view that defendant has no right, under *S&E Contractors, Inc.* v. *United States*, 406 U.S. 1 (1972), *Roscoe-Ajax Constr. Co.* v. *United States*, 204 Ct. Cl. 726, 499 F. 2d 639 (1974), and *Northland Camps, Inc.* v. *United States*, 204 Ct. Cl. 761, 499 F. 2d 658 (1974), to dispute or challenge the Board's determinations as to quantum. First, that part of the Board's determination was not gratuitous or inappropriate. On the contrary, the Board was fully justified, '[i]n view of the voluminous record on the increased cost of performance and the full briefing of cost matters by the parties,' in making findings on quantum even though it had found against plaintiff on the issue of the defendant's liability. That course could save the need for a remand and a further Board hearing if this court should come to a different conclusion on liability, and was entirely appropriate in the circumstances. Second, the issue of quantum (or amount of recovery) has long been regarded both by this court and by the Board as separable and separate from the question of liability, and the plaintiff's challenge to the Board's findings and decision on liability does not relate to the same 'dispute' as the Government attempts to raise with respect to quantum. Third, the plaintiff has not challenged the Board's findings and determination on quantum but accepts them completely, thus presenting no dispute to the court with respect to that subject. Accord-

ingly, the 'appeal' is not maintainable and must be dismissed.[1]

"2. With respect to the defendant's counterclaim challenging Part V of the Board's decision, the court is unwilling to determine at this stage, without deeper inquiry into the scope and reach of plaintiff's own claim which relates to the same delay, whether that counterclaim is maintainable under the tests laid down in *S & E Contractors*, *Roscoe-Ajax*, and *Northland Camps*. The trial judge will have to consider the scope, reach and merits of plaintiff's claim in giving Wunderlich Act review to the case. In that connection he will be in a better position to determine, in the first instance, whether the counterclaim is maintainable because of its relationship to the claim or whether it raises a different 'dispute.' It may also turn out that, in according Wunderlich Act review to the case, the trial judge will find it easier to decide the merits of the counterclaim against the defendant than to determine whether it is maintainable at all. *See Roscoe-Ajax Constr. Co.*, 204 Ct. Cl. 726, 747, 499 F. 2d 639, 650, n. 17 (1974). We shall therefore deny this part of plaintiff's motion without prejudice to its reasserting the point at a later stage of the case. It goes without saying that, in making this disposition, the court takes no position, and intimates no view, either on the merits of the counterclaim or as to whether it is maintainable.

"IT IS THEREFORE ORDERED that plaintiff's motion to dismiss the defendant's 'appeal' from the decision of the ASBCA on the matter of quantum is granted, and the relevant portion of paragraph 23 of defendant's answer to the first amended petition (filed January 18, 1974) is stricken; and

"IT IS FURTHER ORDERED that plaintiff's motion to dismiss the counterclaim is denied without prejudice; and

"IT IS FURTHER ORDERED that the case is returned to the trial division for further proceedings."

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[1] It should be noted, however, that even after dismissal of an "appeal" by the Government on the issue of quantum, the court would not in certain circumstances be irrevocably bound to the Board's findings on quantum. Were the court, for instance, to reverse the Board on the issue of liability, but do so only in part, or do so on a different theory of liability (with different implications for quantum), the court would take those steps necessary to conform plaintiff's relief to the injury.

No. 442–72. JANUARY 10, 1975

James W. Brundage

Military pay; active duty pay claim.—On October 23, 1975 (205 Ct. Cl. 502, 504 F. 2d 1382, *pet. for cert.* filed April 2, 1975), the court held that plaintiff's claim was barred by laches and dismissed the petition. By order dated January 10, 1975 plaintiff's motion for suggestion for rehearing *en banc* and plaintiff's motion for rehearing were denied. Also, on January 10, 1975 the court issued the following order:

"This case comes before the court on the motion of the Bar Association of the District of Columbia for leave to file a brief Amicus Curiae, for waiver of the provisions of Rule 151(b), for an extension of time to file the Amicus Curiae brief, and for leave to present oral argument. Upon consideration of the motion and defendant's opposition thereto,

"IT IS HEREBY ORDERED that the motion is denied on the ground that it was filed too late in the proceedings in this case."

(The Chief Judge and Judge Bennett would allow the motion.)

No. 110–73. JANUARY 10, 1975

Waverly D. Edwards, Jr.

Military pay; claim for back pay and restoration to position; resignation; refusal to permit withdrawal; retroactivity of statute; National Guard technician.—On January 10, 1975 the court issued the following order:

Before COWEN, Chief Judge, KASHIWA and BENNETT, *Judges.*

"The petition in this case was filed by plaintiff, formerly a Technician in the Virginia Army National Guard, seeking to recover back pay and restoration to his former position in the Virginia Army National Guard. The case is before the court on the parties' cross motions for summary judgment, and upon consideration thereof and after hearing oral argument, the court finds:

"(A) On January 28, 1972, plaintiff, who since 1968 had been employed as a Technician in the Virginia Army Na-

tional Guard and held the military rank of Lieutenant Colonel in the Guard, submitted his written resignation from his civilian position for the stated reason of seeking employment closer to Richmond, Virginia. Plaintiff had been asked to resign by the Director of Maintenance of the Virginia National Guard.

"(B) Before any formal administrative action was taken on plaintiff's resignation, he sent a letter to the Director of Maintenance, dated February 21, 1972, asking that he be allowed to withdraw his resignation on the ground that it was rushed, secured by duress and coercion, and obtained contrary to the provisions of National Guard Regulation 690–2, paragraph 7–15, which provided as follows:

> Resignation. As a voluntary action, a resignation should not be demanded as an alternative to some other action to be taken or withheld. A technician may, however, elect to resign rather than submit to removal procedures. Under no circumstances will it be coerced. *It is binding on the technician once submitted; however, at the discretion of the adjutant general, he may be permitted to withdraw his resignation at any time prior to its effective date.* * * * (Emphasis added.)

"In response to plaintiff's request for withdrawal of the resignation, the Adjutant General of the Virginia National Guard had an investigation conducted, as a result of which it was found that plaintiff's resignation had not been coerced. On April 24, 1972, the Adjutant General advised plaintiff by letter that his resignation had been accepted.

"(C) On May 9, 1972, plaintiff sent the Adjutant General a letter under the heading 'Submission of Grievance' in which he claimed that his resignation was a product of duress and coercion and that he should be allowed to withdraw it. In his reply dated June 5, 1972, the Adjutant General informed plaintiff that careful attention had been given to plaintiff's letter of May 9, but that the investigation had shown that the resignation was voluntary and had been submitted without coercion. The letter concluded that the Adjutant General declined to reconsider the case and stated that plaintiff's resignation was therewith accepted effective 17 June 1972.

"(D) On May 25, 1972, the Department of the Army and the Air Force National Guard issued Technician Personnel Pamphlet 904, entitled 'Supervisor's Handbook,' (hereinafter referred to as T.P.P. 904). Section X of T.P.P. 904 is entitled 'Adverse Personnel Action Procedures,' and paragraph 7–36 of section X provides as follows:

> For the purpose of this section, resignation or optional retirement constitutes a removal where there is allegation that such actions were brought about by duress, intimidation or coercion.

In addition, paragraph 7–37, section X recited procedural steps which were required to be followed in adverse actions resulting in the removal of an employee, and paragraph 7–43(b) established the right to a hearing. The Virginia Army National Guard did not receive a copy of T.P.P. 904 until July 7, 1972, and, therefore, neither plaintiff nor the officials of the Guard had actual knowledge of its contents until after June 17, 1972.

"(E) On January 11, 1973, plaintiff submitted to the Adjutant General a written request for reconsideration of the previous decision, which refused to accept the withdrawal of plaintiff's resignation. The request for reconsideration was based on the provisions of T.P.P. 904. The Adjutant General replied by letter of February 14, 1973, stating that he would not reconsider the decision.

"(F) On June 14, 1973, plaintiff applied for and was given a release from his military position in the Virginia National Guard. Subsequently, plaintiff applied for and accepted a position as a Technician, GS–11, Step 9, with the District of Columbia National Guard, and was also given the military rank of Lieutenant Colonel in the District of Columbia National Guard.

"On the basis of the foregoing findings, the court makes the following conclusions of law:

"(1) Final administrative action on plaintiff's request for withdrawal of his resignation was not taken until after T.P.P. 904 was promulgated on May 25, 1972. While it is recognized that statutes are normally given prospective application only, it is the general rule that statutes relating to procedural rights apply to pending, as well as future litiga-

tion, whether the action is pending before the courts, *Rosen* v. *Savant Instruments, Inc.*, 264 F. Supp. 232, 237 (E.D.N.Y. 1967); *Chovan* v. *E. I. Du Pont De Nemours & Co.*, 217 F. Supp. 808, 810 (E.D. Mich. 1963); *cf. Dargel* v. *Henderson*, 200 F. 2d 564, 566 (Emer. Ct. App. 1952), or still in the administrative process, *United States* v. *Haughton*, 413 F. 2d 736, 738 (9th Cir. 1969); *Turner* v. *United States*, 410 F. 2d 837, 842 (5th Cir. 1969). This rule is applicable to T.P.P. 904, because that regulation was promulgated before the effective date of plaintiff's resignation and before completion of administrative action on his request for its withdrawal.

"(2) Although the Adjutant General did not have actual knowledge of the new regulations until after plaintiff's resignation became effective, he had constructive knowledge of the regulations just as private parties are held to have constructive knowledge of regulations published in the Federal Register. *See Coat Corporation of America* v. *United States*, 123 Ct. Cl. 176, 196, 105 F. Supp. 832, 834 (1952). Moreover, since the Adjutant General was given an opportunity to apply T.P.P. 904 when plaintiff brought it to his attention on January 11, 1973, and refused to do so, his ignorance of T.P.P. 904 at the time of its issuance is not a defense to this action.

"(3) The failure and refusal of the Adjutant General to process plaintiff's request for the withdrawal of his resignation in accordance with the requirements of T.P.P. 904, constituted a denial of plaintiff's procedural rights, voids the administrative action, and entitles plaintiff to recover the pay otherwise due him. *Hanifan* v. *United States*, 173 Ct. Cl. 1053, 1062–63, 354 F. 2d 358, 364 (1965) and cases cited therein.

"(4) In order to be employed as a technician of the Virginia Army National Guard, plaintiff is required by 32 U.S.C. 709(b) to hold a military position in the Virginia National Guard. The appointment of officers in the Virginia National Guard is reserved to the Governor of Virginia by Article 1, Section 8, Clause 16 of the United States Constitution and Section 44–27 of the Code of Virginia. Public Law 92–415, 86 Stat. 652, which authorizes this court to issue

orders to Government officials directing restoration of discharged employees to their former positions, does not empower the court to order the Governor of Virginia to reappoint plaintiff to a military position in the Virginia National Guard.

"IT IS THEREFORE ORDERED that this case is hereby remanded to the trial division for determination of the amount of the recovery due plaintiff less any credits and offsets to which defendant is entitled, and

"IT IS FURTHER ORDERED that that part of plaintiff's petition which seeks an order restoring him to his former position in the Virginia National Guard be and the same is denied."

On February 28, 1975 the court denied plaintiff's motion for rehearing and suggestion for rehearing *en banc*.

In accordance with the foregoing Order of the court and a memorandum report of the trial judge, on June 20, 1975 the court entered judgment in favor of plaintiff for $5,117.53, with $1,151.98 to be credited to plaintiff's Civil Service Retirement and Disability Fund Account, $138.95 to be credited to plaintiff's FEGLI Insurance Account, $186.95 to be credited to plaintiff's NGAUS Insurance Account, and the balance of $3,639.65 to be paid to plaintiff.

No. 483–73. JANUARY 10, 1975

Harold N. Holt

Military pay; limitation of actions; accrual of cause of action; tolling of limitations; active duty back pay claim.— On January 10, 1975 the court issued the following order:

Before COWEN, *Chief Judge*, DAVIS and BENNETT, *Judges*.

"This case comes before the court on the parties' cross motions for summary judgment. Plaintiff, a Colonel in the regular Air Force, retired voluntarily on September 1, 1966, and brought this action to recover the active service pay of a Brigadier General from July 1, 1964 to September 1, 1966, and for retired pay as Brigadier General from September 1, 1966 to date of judgment. Upon consideration of the motions and after hearing oral argument, the court finds that plaintiff's cause of action accrued no later than September 1, 1966,

the date of his voluntary retirement. *Kirby* v. *United States*, 201 Ct. Cl. 527 (1973), *cert. denied*, 417 U.S. 919 (1974).

"The court concludes that plaintiff's subsequent application to the Air Force Board For the Correction of Military Records was not mandatory and did not stop the running of the statute of limitations. Since plaintiff's claim is barred by the statute of limitations, 28 U.S.C. § 2501, defendant's motion for summary judgment is granted, plaintiff's cross motion for summary judgment is denied, and plaintiff's petition is hereby dismissed.

"IT IS FURTHER ORDERED that plaintiff's motion for an order under Rule 76, striking defendant's motion for summary judgment be and the same is also denied."

Plaintiff's motion for rehearing and suggestion for rehearing *en banc* were denied February 28, 1975.

No. 728–71. JANUARY 17, 1975

Thelma W. Speir, et al.

Eminent domain; taking; temporary avigation easement; just compensation; litigation expenses.—On October 17, 1973 (202 Ct. Cl. 1020, 485 F. 2d 643) the court held that there was a temporary taking of an avigation easement in the airspace above plaintiffs' tract of land by flights of Government-owned helicopters at an altitude of 250 feet above the surface of the ground, and higher, and that the easement terminated on March 22, 1972. The case was remanded to the trial judge to determine the amount of plaintiffs' recovery. After a trial for reception of evidence respecting the value of the temporary easement, Trial Judge Mastin G. White in a recommended decision filed April 9, 1974 concluded that, from the evidence presented on the issue of liability at the first trial, the tract was less desirable for agricultural rental purposes during the existence of the easement than before and that the rental value for agricultural use during such period was necessarily decreased thereby to some extent. However, there is no basis in the record for an inference that the rental value of the pine woodland or the hardwood swamp in the tract was decreased during the existence of the easement. Trial Judge White concluded that plaintiffs are entitled to

$7,875 representing plaintiffs' damages from the temporary taking, plus reimbursement for litigation expenses (including attorneys' fee) under 42 U.S.C. § 4654(c) in the amount of $5,155.92. This case came before the court, having been submitted without oral argument, on defendant's exceptions to the recommended decision. Upon consideration thereof, together with the briefs of counsel, since the court agrees with the recommended decision, the court affirmed and adopted the same as the basis for its judgment herein, and by order dated January 17, 1975 concluded that plaintiffs are entitled to recover against defendant and entered judgment for plaintiffs for $13,030.92, plus an amount computed at the rate of 4% per annum on $7,875 from October 18, 1967 to the time of payment, all as just compensation for the said taking.

No. 810–71. JANUARY 17, 1975

Dealers Transit, Inc.

On January 17, 1975 the court issued the following order:

"This case comes before the court on its own motion to correct and amend the order entered herein on March 29, 1974 [204 Ct. Cl. 830, 831]. Upon consideration thereof without oral argument,

"IT IS ORDERED that the last two sentences in the last paragraph of the order [page 831], reading:

> Per the stipulation, plaintiff is owed $18.60 by defendant and no more. The plaintiff's petition is dismissed.

be and the same are vacated and stricken and the following is inserted in lieu thereof:

> Per the stipulation, plaintiff is owed $18.60 by defendant and judgment is entered for plaintiff in that amount with plaintiff's petition otherwise dismissed."

No. 76–72. JANUARY 17, 1975

Michael Bruce Kaye

Civilian pay; dismissal; exhaustion of administrative remedies; tort claim.—On January 17, 1975 the court issued the following order:

Before DAVIS, *Judge*, Presiding, KASHIWA and KUNZIG, *Judges*.

"This case comes before the court on plaintiff's motion, filed April 22, 1974, for partial summary judgment and defendant's cross-motion, filed July 8, 1974, for summary judgment having been submitted on the briefs and oral argument of plaintiff, *pro se*, and counsel for defendant. Upon consideration thereof it is concluded that to the extent plaintiff seeks back-pay for an alleged illegal removal, he has not stated a proper claim in that he failed to exhaust his administrative remedy when he did not appeal to the Civil Service Commission's Board of Appeals and Review from the second decision of the Commission's Regional Office. *Feld* v. *United States*, 185 Ct. Cl. 754 (1968), *cert. denied*, 395 U.S. 903 (1969); *Pine* v. *United States*, 178 Ct. Cl. 146, 371 F. 2d 466 (1967); *Adler* v. *United States*, 134 Ct. Cl. 200, 146 F. Supp. 956, *cert. denied*, 352 U.S. 894 (1956). To the extent that plaintiff asks for damages, not back pay, for alleged wrongful acts of government officers in removing him and depriving him of alleged rights, the suit sounds in tort and cannot be maintained in this court. *Algonac Mfg. Co.* v. *United States*, 192 Ct. Cl. 649, 428 F. 2d 1241 (1970); *Martilla* v. *United States*, 118 Ct. Cl. 177, 180–81 (1950). Plaintiff concedes that he has no remedy under the Federal Tort Claims Act, and there would therefore be no purpose in transferring the case to a District Court under 28 U.S.C. § 1506.

"IT IS THEREFORE ORDERED that plaintiff's motion for partial summary judgment is denied, defendant's motion for summary judgment is granted and plaintiff's petition is dismissed."

Plaintiff's motion for rehearing and suggestion for rehearing *en banc* were denied February 28, 1975. On June 12, 1975 plaintiff filed a petition for writ of certiorari.

No. 35–73. JANUARY 17, 1975

Marshall Electronics Co.

Contracts; default termination; lack of 10-day cure notice.—This case is before the court for Wunderlich Act

review of an adverse decision of the Armed Services Board of Contract Appeals. Plaintiff seeks to avoid the consequences of the termination of its Government contract to supply electronic tubes for default in delivery under the standard Default clause by contending that the circumstances required defendant to issue a 10-day cure notice under said clause. In a recommended decision filed July 8, 1974 (reported in full at 20 CCF para. 83, 188), Trial Judge C. Murray Bernhardt concluded that the Government properly terminated the contract, despite failure to issue a 10-day cure notice. If a default in delivery has occurred and the contractor has no acceptable excuse and the Government is not at fault, an outright termination notice is the appropriate course without a cure notice. Since plaintiff's only defense to the Government's counterclaim for excess reprocurement costs is that a finding of wrongful default termination and conversion to termination for convenience would automatically preclude recovery under the counterclaim, and since plaintiff has failed in this undertaking, defendant is entitled to recover on its counterclaim. This case came before the court on plaintiff's request for review by the court of the recommended decision on plaintiff's motion and defendant's cross-motion for summary judgment. Upon consideration thereof, together with the briefs of counsel, since the court agrees with the said decision, the court, by order dated January 17, 1975, adopted the said decision as the basis for its judgment in this case. The court concluded and ordered that plaintiff is not entitled to recover, that defendant is entitled to recover on its counterclaim in accordance with the decision, that the petition be dismissed, and entered judgment against plaintiff and for defendant on its counterclaim for $29,344.72, plus interest as provided by the contract.

No. 56–73. JANUARY 17, 1975

Iannuccillo Construction Company

Contracts; changed conditions; changes.—Plaintiff seeks additional compensation under a contract with the Navy for construction of 300 units of family housing at Newport.

Rhode Island. Plaintiff claims (1) compensation under the changed conditions clause on the theory that it was required to strip and set aside an amount of topsoil in excess of what the Government-furnished drawings led it to expect; and (2) compensation under the changes clause for defendant's requirement that it add an additional ¼-inch flooring-underlayment as an alternative to providing blocks between the joists to which to nail the edges of plywood subflooring, neither of which was provided for in the specifications. The Armed Services Board of Contract Appeals rejected both claims. In a recommended opinion filed March 14, 1974 (reported in full at 19 CCF para. 82,903), Trial Judge Philip R. Miller concluded, as to (1) above, that the Board's findings and decision that the topsoil encountered by plaintiff did not differ materially from conditions indicated in the contract, that to the extent there were differences they were inherent in the nature of the work, and that consequently there were no changed conditions, are supported by substantial evidence. As to (2) above, Trial Judge Miller in agreeing with the Board concluded that blocking was required by the contract for the edges of the combined subflooring and underlayment panels by necessary implication because otherwise there would be nothing to receive the nails at the specified 6-inch intervals and that the obvious purpose of the nailing was to eliminate springing or bending in the floor. He points out that an experienced contractor is not entitled to construe specifications in a manner which he knows cannot produce the desired result. This case came before the court on plaintiff's request for review of the recommended decision, on the parties' cross-motions for summary judgment and on defendant's motion that the court adopt the decision in its entirety. Upon consideration thereof, together with the briefs and oral argument of counsel, since the court agrees with the recommended decision, on January 17, 1975, by order, the court denied plaintiff's request for review, granted defendant's motion to adopt and adopted the said decision as the basis for its judgment in this case, denied plaintiff's motion for summary judgment, granted defendant's motion for summary judgment, and dismissed the petition.

No. 199–73. JANUARY 17, 1975

Service Technicians, Inc.

Contracts; interpretation; reasonableness of interpretation; necessity to seek clarification.—Plaintiff seeks additional compensation under a fixed-price contract for performance of various custodial services at Luke Air Force Base, Arizona, following denial of its claim by the Armed Services Board of Contract Appeals. The contract provided, *inter alia*, for both "regular custodial service" and "extended custodial service," and plaintiff contends here, as it did before the Board, that as applied to floor care for a given area the terms are mutually exclusive under the contract so that any floor area within its coverage is to receive either regular service or extended service but not both. In a recommended decision filed February 22, 1974 (reported in full at 19 CCF para. 82,874), Trial Judge George Willi concluded that plaintiff's understanding was so patently lacking in reasonableness, in the context of the contract as a whole, that plaintiff cannot be excused from having failed to seek clarification prior to bid submission. On January 17, 1975 the court issued the following order:

Before DAVIS, *Judge*, Presiding, KASHIWA and KUNZIG, *Judges*.

"This case comes before the court on plaintiff's request, filed March 28, 1974, for review by the court of the recommended decision filed by Trial Judge George Willi on February 22, 1974, pursuant to Rule 166(c) on plaintiff's motion and defendant's cross-motion for summary judgment, having been submitted on the briefs and oral argument of counsel. On the basis of Trial Judge Willi's discussion in his opinion, the court is of the view that the Government's construction of the contract is correct and that, at the best for plaintiff, the contract had a glaring ambiguity calling upon plaintiff to make an inquiry before bidding and before following its own unilateral interpretation (even if that interpretation, standing by itself, might be considered reasonable). See *Space Corp.* v. *United States*, 200 Ct. Cl. 1, 470 F. 2d 536 (1972).

"IT IS THEREFORE ORDERED that plaintiff's motion for summary judgment is denied, defendant's motion for summary judgment is granted and plaintiff's petition is dismissed."

Plaintiff's petition for certiorari was denied June 9, 1975.

No. 315–73. JANUARY 17, 1975

Harold E. Hasselberg

Military pay; retired pay (disability); limitation of actions.—Plaintiff was retired from the Marine Corps with a permanent disability rating of 40% as found by the Physical Evaluation Board in 1953. In 1966 plaintiff applied to the Board for Correction of Naval Records for correction of his records to reflect an increase in his disability rating. The Board denied the application in 1967 and 1968. Plaintiff filed suit in this court seeking an increase in his disability rating with benefits retroactive to the date of his discharge. On January 17, 1975 the court issued the following order:

Before DAVIS, *Judge*, Presiding, KASHIWA and KUNZIG, *Judges.*

"This case comes before the court on defendant's motion for summary judgment, filed March 22, 1974, and plaintiff's motion for summary judgment, filed June 10, 1974. Upon consideration thereof, together with the briefs and oral argument by counsel for defendant and plaintiff, *pro se*, it is concluded that plaintiff's alleged claim is clearly barred by the statute of limitations, 28 U.S.C. § 2501. (See *Friedman* v. *United States*, 159 Ct. Cl. 1, 310 F. 2d 381 (1962), *cert. denied*, *sub nom. Lipp* v. *United States*, 373 U.S. 932 (1963).)

"IT IS THEREFORE ORDERED that plaintiff's motion for summary judgment is denied, defendant's motion for summary judgment is granted and plaintiff's petition is dismissed."

On February 24, 1975 the court denied plaintiff's motion for rehearing, and on May 30, 1975 the court denied plaintiff's motion for relief from the order.

No. 355–73. JANUARY 17, 1975

Cantwell C. Brown

Military pay; retired pay (nondisability); entitlement to retired pay; 20 years qualified service.—On January 17, 1975 the court issued the following order:

Before KASHIWA, *Judge*, Presiding, DURFEE, *Senior Judge*, and KUNZIG, *Judge*.

"This military pay case comes before the court on defendant's motion, filed June 7, 1974, and plaintiff's cross-motion, filed July 16, 1974, for summary judgment in No. 355–73.

"Plaintiff, a retired reserve officer, filed an application in April 1968, for retired pay benefits. Plaintiff had entered the active reserves on June 2, 1931 and continued in either active status during World War II or active reserve status through July 1, 1950. Plaintiff resided in Mexico after World War II.

"Plaintiff's application for retired pay benefits was denied on the ground that he did not have 20 years of qualified service. His records indicated that he had compiled 18 years and 29 days of qualifying service before being discharged from inactive Reserve status and his commission revoked on April 1, 1953. Upon consideration of the motions and after hearing oral argument, together with the pleadings, briefs and exhibits submitted, it is concluded that there is no genuine issue as to any material fact and that defendant is entitled to judgment as a matter of law.

"Although plaintiff claims to have served as a part-time undercover intelligence gatherer for the Defense Attache at the United States Embassy in Mexico, he was never reported by the Embassy nor do his military records show such service. Applicable Army regulations contemplate not only a cognizance on the part of Army officials as to Reserve training activities, but also prior approval of such activities. *See* Army Regs. SR–140–350–20 and SR–140–190–2. The record plainly shows that plaintiff failed to comply with these regulations.

"Additionally, the undisputed facts show that the order assigning plaintiff to a Reserve unit in 1949 listed his address

as Arlington, Virginia. Plaintiff was granted a waiver of the point requirement to remain in the active reserves in 1950. The notification of the waiver was sent to plaintiff in Mexico, but specifically stated that his Army file listed plaintiff's permanent address to be Arlington, Virginia. Plaintiff never corrected these records to indicate Mexico as his permanent address. Consequently, in 1950, when the Army transferred plaintiff to inactive status, albeit mistakenly, and attempted to notify plaintiff of this fact at the Arlington, Virginia address, plaintiff did not receive notification. And when the Army attempted to notify plaintiff of the expiration of his Reserve appointment by operation of law in 1953, plaintiff again did not receive notification. Had plaintiff supplied the Army with accurate address records, or had plaintiff bothered to check with the Army during the period in question, he would have been advised that he was lacking almost two years of credit for retirement pay purposes. However, plaintiff's lack of diligence in this case is deemed fatal to his recovery.

"On this record, we do not think it can be said that the Army Board for Correction of Military Records acted arbitrarily, capriciously or contrary to law in denying plaintiff's application.

"IT IS THEREFORE ORDERED that defendant's motion for summary judgment is granted, plaintiff's cross-motion for summary judgment is denied and plaintiff's petition is dismissed."

No. 420–73. JANUARY 17, 1975

Contra Costa County Water District

Eminent domain; taking; compensability; loss of facilities through condemnation of property.—Plaintiff asserts that defendant acquired by negotiated purchases and condemnation (*see United States* v. *40.60 Acres of Land*, 483 F. 2d 927 (9th Cir. 1973), *vacating* judgment in *United States* v. *40.60 Acres of Land*, 324 F. Supp. 573 (N.D. Cal. 1971)) lands in Contra Costa County, California, where plaintiff owned certain property consisting of easements and certain facilities used as part of its water distribution system to users in the community, that defendant uses the land as a safety zone in connection with the United States Naval

Weapons Station, that as a result of such acquisition and use the value and usefulness of plaintiff's property has been completely destroyed, and that the acquisition constitutes a Fifth Amendment taking. Plaintiff seeks just compensation, plus interest and costs of litigation. On January 17, 1975 the court issued the following order:

Before DAVIS, *Judge*, Presiding, and KUNZIG, *Judge*.

"This case comes before the court on defendant's motion for summary judgment, filed February 28, 1974, and plaintiff's cross-motion for summary judgment, filed April 9, 1974. Upon consideration thereof, together with the briefs and oral statements of counsel, it is concluded on the basis of the decision by this court in *Southern Counties Gas Co. of California* v. *United States*, 141 Ct. Cl. 28, 157 F. Supp. 934, *cert. denied*, 358 U.S. 815 (1958), that plaintiff is not entitled to recover.

"IT IS THEREFORE ORDERED that plaintiff's motion for summary judgment is denied, defendant's motion for summary judgment is granted and plaintiff's petition is dismissed."

On February 28, 1975 plaintiff's motion for rehearing *en banc* was denied. On May 16, 1975 plaintiff filed a petition for writ of certiorari.

No. 63–74. JANUARY 17, 1975

Charles C. Wise

Civilian pay; Civil Service retirement; computation of annuity; creditable service.—On January 17, 1975 the court issued the following order:

Before KASHIWA, *Judge*, Presiding, DURFEE, *Senior Judge*, and KUNZIG, *Judge*.

"This civilian pay case comes before the court on plaintiff's motion, filed May 20, 1974, and defendant's cross-motion, filed July 8, 1974, for summary judgment in No. 63–74.

"Plaintiff seeks the inclusion of eleven additional months of service in the computation of his retirement annuity. He claims that his activities as a substitute teacher and office worker at Eastern High School, Washington, D.C. between September 1932 through September 1933 were improperly excluded from his qualifying time when his retirement and annuity benefits were computed in May, 1973. Upon con-

sideration of the motions, together with the pleadings, briefs and exhibit submitted by the parties, without oral argument, it is concluded that there is no genuine issue as to any material fact and that defendant is entitled to judgment as a matter of law.

"It is undisputed that plaintiff was not carried on Federal roles during the period in question. He was paid for his activities from a private fund held by the principal of the high school which did not include any federally supplied monies. Therefore, plaintiff, during the period in question, did not qualify as an employee under 5 U.S.C. §§ 8331–8332 (1970). *See Dismuke* v. *United States*, 297 U.S. 167 (1936) and *Douglas* v. *Wallace*, 161 U.S. 346 (1896).

"IT IS THEREFORE ORDERED that plaintiff's motion for summary judgment is denied, defendant's cross-motion for summary judgment is granted and plaintiff's petition is dismissed."

No. 286–74. JANUARY 17, 1975

Wendell P. Rynerson

Military pay; retired pay (nondisability); res judicata.—On January 17, 1975 the court issued the following order:

Before SKELTON, *Judge*, Presiding, NICHOLS and BENNETT, *Judges*.

"This case comes before the court on defendant's motion, filed October 1, 1974, to dismiss plaintiff's petition and plaintiff's motion for summary judgment, filed October 31, 1974, having been submitted to the court on the briefs and oral argument of counsel. Upon consideration thereof, it is concluded, on the basis of the decision by this court in *Rynerson* v. *United States* (Order of June 22, 1973, dismissing plaintiff's petition), 202 Ct. Cl. 1095, *cert. denied*, 415 U.S. 995 (1974), that plaintiff's alleged claim is barred under the doctrine of *res judicata* and, further, that plaintiff's claim is barred by the statute of limitations, 28 U.S.C. § 2501.

"IT IS THEREFORE ORDERED that plaintiff's motion for summary judgment is denied, defendant's motion to dismiss the petition is granted and plaintiff's petition is dismissed."

On February 28, 1975 the court denied plaintiff's motion for rehearing and his suggestion for rehearing *en banc*.

No. 97–66. JANUARY 31, 1975

Merritt-Chapman & Scott Corporation

Contracts; breach; delays and disruption of work; multiplicity of changes; escalation of labor costs; financing costs; delay in payment.—This case arose out of a fixed-price contract for construction of the SAVANNAH nuclear-powered merchant ship (see the report of an earlier phase of this case, *New York Shipbuilding Corp.* v. *United States*, 180 Ct. Cl. 446, 385 F. 2d 427 (1967)). In connection with the actual performance of the contract, plaintiff has alleged and submitted a delay and disruption claim on the basis that defendant was responsible for the overrun of 576 days. In a recommended decision filed August 29, 1973 (reported in full at 19 CCF para. 82,468), Senior Trial Judge Mastin G. White concluded that all of the delay was not due entirely to the breach by defendant of its contractual obligation to make timely delivery of GFM items, and that plaintiff is entitled to recover, the amount to be determined in subsequent proceedings; that although the changes were extremely numerous, they were, individually and collectively, within the scope of defendant's discretion to make under the contract, and the completed project was essentially the same as that contracted for; that since both parties shared the responsibility for the delay it is fair and equitable to apply the contract formula respecting the claim for increased labor costs; that plaintiff's claim of increased financing costs must be denied for lack of proof; that defendant is not liable for failure to make prompt payment despite the delay because the "final decision" was a nullity having been made by one not authorized to decide plaintiff's claim, and furthermore the claim is essentially a demand for payment of interest. This case came before the court on a stipulation of the parties filed January 21, 1975, whereby plaintiff agreed to accept the sum of $2,572,991.61 in full settlement of all claims set forth in the petition and defendant consented to

entry of judgment in that amount and to dismissal of its counterclaim with prejudice. On January 31, 1975 the court, by Order, entered judgment for plaintiff for $2,572,991.61 and dismissed with prejudice defendant's counterclaim.

No. 83–70. JANUARY 31, 1975

American Aspen Corporation

Contract of sale; Court of Claims jurisdiction; Economic Development Administration agreement to assumption by buyer of seller's financial obligations to EDA.—Plaintiff alleges two causes of action against the United States arising out of the sale of the assets of Aspen Wood Products Corporation. The first cause of action alleges certain false representations by a representative of defendant (Economic Development Administration) for which plaintiff seeks recision of a contract of sale and damages. The second cause of action alleges breaches by defendant of certain warranties of a contract of sale for which plaintiff seeks damages. On January 31, 1975 the court issued the following order:

Before COWEN, *Chief Judge*, DAVIS and SKELTON, *Judges*.

"This case comes before the court on defendant's motion for summary judgment. Upon consideration thereof and plaintiff's brief in opposition thereto, the court finds that on the basis of the pleadings and the undisputed facts, there is no substantial showing that there was either an express or an implied contract between plaintiff and defendant with respect to the matters in controversy. *See Housing Corp. of America* v. *United States*, 199 Ct. Cl. 705, 710, 468 F. 2d 922, 924 (1972); *D. R. Smalley & Sons* v. *United States*, 178 Ct. Cl. 593, 598, 372 F. 2d 505, 508, *cert. denied*, 389 U.S. 835 (1967). *See also Somali Development Bank* v. *United States*, 205 Ct. Cl. 741, 508 F. 2d 817 (1974). Since the previous decisions of this court leave no room for the inference that the claim is one within the jurisdiction of the court, it follows that plaintiff's petition must be dismissed. *Levering Garrigues Co.* v. *Morrin*, 289 U.S. 103, 105–06 (1933); *see Ralston Steel Corp.* v. *United States*, 169 Ct. Cl. 119, 340 F. 2d 663, *cert. denied*, 381 U.S. 950 (1965).

"The court also concludes that the counterclaim must be dismissed since we are without jurisdiction of plaintiff's claim. *Mulholland* v. *United States*, 175 Ct. Cl. 832, 361 F. 2d 237 (1966); *Alloy Products Corp.* v. *United States*, 157 Ct. Cl. 376, 302 F. 2d 528 (1962).

"IT IS THEREFORE ORDERED that plaintiff's petition and defendant's counterclaim are both hereby dismissed."

No. 330–72. JANUARY 31, 1975

John M. Keltch, Inc.

Contracts; changed conditions; differing subsurface conditions.—Plaintiff contracted with the Department of Interior to install underground drainage lines in connection with the Columbia Basin Project. Plaintiff contended before the contracting officer and the Interior Contract Appeals Board that at certain points in excavating the trench at the bottom of which the pipe was to be laid, it encountered excess subsurface water conditions entitling it to an equitable adjustment under the Changed Conditions Clause of the contract. The contracting officer and the Board denied plaintiff's claim on the ground that the contract contained sufficient data to warn plaintiff of the adverse subsurface soil conditions. In a recommended opinion filed January 23, 1974 (reported in full at 19 CCF para. 82785), Trial Judge Charlotte P. Murphy concluded that there was substantial evidence to support the Board's findings. This case came before the court on plaintiff's request for review of the recommended decision, on the parties' cross-motions for summary judgment, and on defendant's motion to strike certain items from plaintiff's reply brief. Upon consideration thereof, together with the briefs and oral argument of counsel, the court agrees generally with Trial Judge Murphy's views and, without adopting the opinion *in toto*, rests its determination essentially on those views. On January 31, 1975, by order, the court denied plaintiff's motion for summary judgment and defendant's motion to strike, granted defendant's motion for summary judgment, and dismissed the petition.

No. 343–72. JANUARY 31, 1975

Weather Engineering Corporation of America and Weather Engineering Corporation of Canda, Ltd. (Montana State University and EG&G, Inc., Third-party Defendants)

Patents; infringement.—In this case plaintiffs sue the United States for infringement of their U.S. patent No. 3,441,214 relating to a cloud seeding process to produce rain. On January 31, 1975 the court issued the following order:

Before COWEN, *Chief Judge*, DAVIS and SKELTON, *Judges*.

"This case comes before the court on motion for summary judgment, filed September 27, 1974, by the third-party defendant, Montana State University, and on motion for summary judgment, filed October 21, 1974, by the third-party defendant, EG&G, Inc., to which motions the plaintiffs and defendant have filed no response within the time permitted by the Rules of the court for such response. Upon consideration thereof, without oral argument, it is concluded that plaintiffs and defendant in effect concede, by their deliberate failure to oppose the said motions, that neither third-party has infringed the patent and the court finds and adjudicates non-infringement by the said third-parties; however, as to the third-party, EG&G, Inc., only as to the performance of contract NO. 14–06–D–6963 and as to the third-party, Montana State University, only as to the performance of contract No. 14–06–D–6798. See *Universal Oil Co.* v. *Globe Oil & Ref. Co.*, 322 U.S. 471 (1944); *Goodyear Dental Vulcanite Co.* v. *Davis*, 102 U.S. 222 (1880); and *International Glass Co.* v. *United States*, 187 Ct. Cl. 376, 408 F. 2d 395 (1969).

"IT IS THEREFORE ORDERED that the said motions for summary judgment of these third-parties be and the same are granted and the third-parties are dismissed as parties to this case.

"IT IS FURTHER ORDERED that the request of the third-parties for an award of costs be and the same is denied."

On April 25, 1975, the court denied plaintiffs' motion, as amended, for relief from the foregoing order.

No. 458–72. JANUARY 31, 1975

Phan Thi Pruong (Le Phan)

Contracts; disputes; exhaustion of administrative remedies.—On January 31, 1975 the court issued the following order:

Before COWEN, *Chief Judge*, DAVIS and SKELTON, *Judges.*

"This case comes before the court on plaintiff's motion, filed December 19, 1974, to terminate stay of proceedings or, in the alternative, to dismiss without prejudice. Upon consideration thereof, together with defendant's response in opposition thereto, without oral argument, it is concluded that the circumstances in this case warrant dismissal of the petition as being premature. *See Zidell Explorations, Inc.* v. *United States*, 192 Ct. Cl. 331, 427 F. 2d 735 (1970).

"IT IS THEREFORE ORDERED that plaintiff's alternative motion to dismiss the petition without prejudice be and the same is granted and the petition is so dismissed."

No. 86–73. JANUARY 31, 1975

Thomas George

Civilian pay; dismissal.—Plaintiff, a substitute carrier at the Cleveland, Ohio Post Office, challenges his dismissal from his employment which was effective November 1, 1968. Plaintiff contested his separation administratively, appealing the agency action to the Regional Director, Post Office Department, who sustained the appeal, and then to the Post Office Department Board of Appeals and Review which upheld the decision to remove plaintiff on the merits. On January 31, 1975 the court issued the following order:

Before COWEN, *Chief Judge*, DAVIS and SKELTON, *Judges.*

"This case comes before the court on defendant's motion, filed November 4, 1974, for summary judgment. Upon consideration thereof, without oral argument, it is concluded that plaintiff's removal from his position was supported by substantial evidence that there are no unresolved questions of

fact, that the decision was neither arbitrary nor capricious nor an abuse of discretion, that there were no procedural defects and thus plaintiff is not entitled to recover. *See Grover* v. *United States*, 200 Ct. Cl. 337 (1973) and *Morelli* v. *United States*, 177 Ct. Cl. 848 (1966).

"IT IS THEREFORE ORDERED that defendant's motion for summary judgment is granted and plaintiff's petition is dismissed."

No. 120–73. JANUARY 24, 1975

A. Michael Richman

Civilian pay; removal for medical disqualification; legality of administrative proceedings.—On January 24, 1975 the court issued the following order:

Before DAVIS, *Judge*, Presiding, KASHIWA and KUNZIG, *Judges*.

"This case comes before the court on defendant's motion, filed April 16, 1974, for summary judgment and plaintiff's motion, filed July 15, 1974, for summary judgment, having been submitted and considered on the briefs and oral argument of counsel.

"Plaintiff claims that his removal as an air controller and an FAA employee on the ground of medical disqualification was improper and illegal, but we find no merit in any of his procedural or substantive attacks on the removal proceedings or any adequate reason to have a trial in this court.

"There was no material procedural error below. The administrative record compiled before the agency and the Civil Service Commission, including a full trial-type hearing before the Commission, was sufficiently complete, and plaintiff was not deprived of the right to present relevant evidence either with respect to his claim that he was removed for union activities rather than for medical reasons[1] or his argument that the medical evidence was insufficient. There is therefore no reason for a trial in this court.

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[1] The Civil Service Commission trial examiner did not abuse his discretion in rejecting plaintiff's proffer of proof as to the alleged removal for union activity of other FAA employees from a different region of the country.

"As for the specific procedural errors alleged, no prejudice has been shown from the alleged failure to allow plaintiff to see or review all the medical evidence against him before he was terminated; all this evidence was available at the hearing and plaintiff was given in advance the evidence on which the deciding official actually acted. Nor was it error to fail to produce from Washington Dr. Siegel, the Federal Air Surgeon, at the hearing in Los Angeles; in view of the other evidence presented, the testimony of Dr. Siegel (who had never examined plaintiff) was not essential, and it was far from an abuse of discretion to deem it impractical to require him to appear in Los Angeles. Plaintiff is also clearly wrong in urging that it was error to allow the CSC Regional Office decision to be signed by someone other than the examiner who had actually conducted the hearing. *See, e.g., Tri-Cor, Inc.* v. *United States*, 198 Ct. Cl. 187, 195, 458 F. 2d 112, 116 (1972).

"There was likewise no substantive error. The findings of the Commission and the agency that plaintiff was medically disqualified for an air controller position were supported by substantial evidence on the record as a whole, and were neither arbitrary nor capricious. The same is true of the Commission's findings that (a) the removal was actually based on plaintiff's medical qualifications, not on his union activity or his participation in the controllers' "sick-out," and that (b) the agency made a bona fide effort, as required by its regulations, to relocate plaintiff in another FAA position not calling for a controller's medical qualifications, and the failure to relocate plaintiff was not due to lack of proper effort by the agency. There is no reason whatever to consider any of these findings of the Commission to have been the result of bias or prejudice.

"IT IS THEREFORE ORDERED that plaintiff's motion for summary judgment be and the same is denied, defendant's motion for summary judgment is granted and plaintiff's petition is dismissed."

On March 28, 1975 the court denied plaintiff's motion for a rehearing or revisal of the foregoing order.

No. 145–73. JANUARY 31, 1975

William John Arthur, Jr.

Civilian pay; voluntariness of separation; appropriateness of trial de novo.—On January 31, 1975 the court issued the following order:

Before COWEN, *Chief Judge*, DAVIS and SKELTON, *Judges.*

"This case comes before the court on defendant's motion for summary judgment. Upon consideration thereof, plus plaintiff's response thereto, the court finds:

"(1) Plaintiff, a former civilian employee of the Defense Supply Agency, brought this action to recover back pay, restoration to his former position, and certain retirement benefits based on his allegation that he was "involuntarily separated" for Civil Service Retirement purposes.

"(2) After plaintiff's suit was filed, proceedings in the court were held in abeyance to enable the Board of Appeals and Review of the Civil Service Commission to review the merits of plaintiff's appeal. After opening the record for whatever additional evidence the parties wished to present, the Board of Appeals and Review upheld the previous determination that plaintiff's separation was not an involuntary separation for retirement purposes.

"(3) The final decision of the Civil Service Commission is not arbitrary or capricious; it is supported by substantial evidence, and the Civil Service Commission followed the applicable regulations. Since plaintiff was permitted to present any additional evidence which he believed to be pertinent before the final decision of the Board of Appeals and Review, this is not a case in which plaintiff should be permitted to expand the administrative record by de novo evidence in court. *See Esgate* v. *United States*, 186 Ct. Cl. 207 (1968), *cert. denied*, 395 U.S. 913 (1969).

"IT IS THEREFORE ORDERED that plaintiff's petition be and the same is hereby dismissed."

No. 335–73. JANUARY 24, 1975

A. C. Ball Company

Contracts; ambiguity; necessity to seek clarification.— On January 24, 1975 the court issued the following order:

Before DAVIS, *Judge*, Presiding, KASHIWA and KUNZIG, *Judges*.

"This Wunderlich Act case comes before the court on plaintiff's motion for summary judgment, filed March 18, 1974, and defendant's cross-motion for summary judgment, filed April 17, 1974. Upon consideration thereof, together with the briefs submitted by counsel without oral argument, it is concluded that the decision of the Armed Services Board of Contract Appeals of May 25, 1972 denying plaintiff's claim is correct as a matter of law.

"Plaintiff was awarded a contract to deliver 62 expedient refueler fuel dispensing pump assemblies. Although the contract specifications provided that fuel servicing nozzles be furnished with each pump assembly, plaintiff did not include the cost of these nozzles in calculating its bid, because plaintiff believed that the pump assemblies were to be used in helicopter fuel servicing units, and thus would not be required. Plaintiff was not officially informed prior to the submission of its bid that the pump assemblies were to be used in helicopter fuel servicing units, nor did the contract state the intended use of the pump assemblies. The Government required the nozzles to be included in the pump assemblies, and plaintiff did so perform but has sought payment as a constructive change.

"Paragraph 3 of the 'Solicitation Instructions and Conditions' provided that any request for information concerning the specifics of a bid item must be submitted in writing and that only official replies would be binding. Plaintiff never officially inquired as to the intended use until *after* its bid had been accepted. The absence of such a request for clarification, before submission of its bid, negates any merit of plaintiff's claim. When a contractor in preparing a bid is faced with

a patent ambiguity in the specifications, he is obligated to seek clarification before bidding if he intends subsequently to seek resolution of the issue in his favor. *See Space Corporation* v. *United States*, 200 Ct. Cl. 1, 470 F. 2d 536 (1972).

"IT IS THEREFORE ORDERED that plaintiff's motion for summary judgment is denied, defendant's motion for summary judgment is granted, and plaintiff's petition is dismissed."

No. 447-73. JANUARY 24, 1975

RFI Shield-Rooms

Contracts; disputes; exhaustion of administrative remedies; delay of contracting officer in rendering decision.—On January 24, 1975 the court issued the following order:

Before DAVIS, *Judge*, Presiding, KASHIWA and KUNZIG, *Judges*.

"This case comes before the court on defendant's motion, filed March 22, 1974, for summary judgment and on plaintiff's motion, filed April 29, 1974, for summary judgment, having been submitted and considered on the briefs and oral argument of counsel.

"Defendant seeks dismissal of the petition on the ground that plaintiff failed to exhaust its administrative remedies in that it prematurely filed suit before the contracting officer had rendered his formal final decision on the dispute, and before an undue time had elapsed. Plaintiff urges that the contracting officer's delay rendered the remedy under the contract inadequate and unavailable, thus permitting suit in this court. The record clearly shows that the plaintiff knew when it filed its petition here that in all probability the contracting officer intended to rule against it and had so indicated, although the formal "final decision" of the contracting officer had not yet issued. When suit was filed, less than four months had elapsed since the dispute first arose, and in the interim there had been negotiations and efforts to resolve the controversy. There were some further negotiations after this action was begun on November 26, 1973; when these failed the contracting officer issued a formal final decision on Janu-

ary 2, 1974. The contractor appealed from that formal final decision but also asked the Board to dismiss the appeal. The Board granted that motion without prejudice, permitting the plaintiff to reinstate his appeal 'if such action becomes appropriate because of action taken by the Court of Claims or otherwise.'

"In the circumstances, we hold that the delay from August to November in the rendering of the contracting officer's final decision was not so unreasonable as to warrant suit in this court and that the contractor prematurely sought judicial relief. See *Zidell Explorations, Inc.* v. *United States*, 192 Ct. Cl. 331, 427 F. 2d 735 (1970); *Clement Brothers Co.* v. *United States*, 190 Ct. Cl. 50, 418 F. 2d 1356 (1969); *Sun Shipbuilding & Dry Dock Co.* v. *United States*, 198 Ct. Cl. 693, 461 F. 2d 1352, *cert. denied*, 409 U.S. 1023 (1972); *Aerojet-General Corp.* v. *United States*, 205 Ct. Cl. 823 (1974).

"We also hold that the dispute falls under the contract and, as the Board said in its order dismissing the appeal without prejudice, that it has jurisdiction to consider and finally determine the appeal and afford, if warranted, a complete remedy under the contract. *See Zidell Explorations, Inc.* v. *United States, supra.* The preferable procedure in this instance, in which an appeal was actually filed with the ASBCA and the Board acted on the case, is to remand to the ASBCA which can and should, as the dismissal order expressly provides, reinstate the appeal under its Rule 30. *Cf. Aerojet-General Corp.* v. *United States, supra.*

"IT IS THEREFORE ORDERED that plaintiff's motion for summary judgment is denied and defendant's motion for summary judgment is granted to the extent that the case is remanded, pursuant to Rule 149, to the Armed Services Board of Contract Appeals for further proceedings under the contract with further proceedings before this court stayed for a period of six (6) months from the date hereof. Plaintiff's counsel is designated to advise the court by letter to the trial judge of the status of the remand proceedings pursuant to Rule 149(f). Attention of counsel and the Board is also directed to Rule 150."

APP. No. 15–74. JANUARY 31, 1975

Bay Mills Indian Community, et al.

Indian claims; appeal from Indian Claims Commission; unconscionable consideration.—Appellants sought before the Indian Claims Commission additional compensation under Clause 3, Sec. 2 of the Indian Claims Commission Act, 60 Stat. 1049, 1050, for lands which were ceded to the United States by the Treaty of June 16, 1820, 7 Stat. 206. The lands, described in Article I of the treaty, have been delineated as Area 112 by Charles C. Royce. Prior to the decision from which the present appeal is taken, the Commission had determined that appellants' ancestors had held Indian title to Area 112, that the area contained 10,240 acres, and that it should be valued as of March 2, 1821, the effective date of the 1820 treaty. Area 112 was a strip of land 1 mile wide by 16 miles long extending down the St. Mary's River from the falls. Appellants have contended that the ceded area included only 4 miles of frontage on the St. Mary's River but extended further inland to include a total of 16 square miles, and contend here that the Commission erred on value in that it failed to value the entire ceded lands as a one unit townsite area and in failing to find a value between the minimum value of $20.00 per acre established by appellees' evidence and something greater. In a decision reported at 32 Ind. Cl. Comm. 303 (1973), the Commission concluded that the fair market value of Area 112 on March 2, 1821 was $15,000, that the payment of a nominal consideration by defendant for a tract of land worth $15,000 was unconscionable within the meaning of Clause 3, Sec. 2 of the Indian Claims Commission Act, that defendant had no offsets to assert in this case, and that plaintiffs, for and on behalf of the Sault Ste. Marie Band of Chippewa Indians, are entitled to recover $15,000 in full satisfaction of all claims asserted under Docket 18–R. On January 31, 1975 the court issued the following order:

Before COWEN, *Chief Judge*, SKELTON and BENNETT, *Judges*.

"This case comes before the court on an appeal from a determination made by the Indian Claims Commission as to the compensation due appellants for lands ceded to the United States. Upon consideration of the record before the

Indian Claims Commission, the briefs, and the oral argument of counsel, the court finds that the findings of fact made by the Indian Claims Commission are supported by substantial evidence and that the Commission's conclusions of law are valid and are supported by the findings of fact.

"IT IS THEREFORE ORDERED that the decision of the Indian Claims Commission in Docket No. 18–R, 32 Ind. Cl. Comm. 303 (1973), be and the same is hereby *affirmed*."

No. 22–74. JANUARY 31, 1975

David William Palmer II

Military pay; promotion; active duty training compensation.—On January 31, 1975 the court issued the following order:

Before COWEN, *Chief Judge*, DURFEE, *Senior Judge*, and NICHOLS, *Judge*.

"This case comes before the court on plaintiff's motion for summary judgment and defendant's cross motion for summary judgment. Upon consideration of the motions, the briefs of the parties, and oral argument by plaintiff *pro se* and counsel for defendant, the court finds:

"(1) On June 11, 1971, plaintiff's appointment as a Captain in the Army Reserve was voided, but thereafter on April 27, 1972, his appointment was determined to be valid, and the previous action voiding the appointment was withdrawn.

"(2) At the time plaintiff's appointment was voided, he was assigned to an organized reserve unit and was receiving pay and other benefits for attending scheduled drills with his reserve unit. But for the voiding of plaintiff's appointment, he would have been entitled to participate in ten regularly scheduled weekend drills and one two-week summer encampment with his assigned reserve unit. Defendant concedes plaintiff is entitled to a judgment of $1,857, representing basic pay which plaintiff would have received for the ten weekend drills and the two-week tour of summer camp.

"(3) Prior to the voiding of his appointment, plaintiff had been ordered to 131 days' active duty training in the U.S. Army Command and General Staff College, Fort Leavenworth, Kansas, from August 9 to December 17, 1971. As a

consequence of the voiding of his appointment, plaintiff did not receive this active duty training in 1971, but after his appointment was determined to be valid, he was assigned to and did perform active duty training at the U.S. Command and General Staff College, Fort Leavenworth, Kansas, for a period of 131 days running from January 8, 1973 to May 18, 1973.

"(4) Effective March 23, 1973, plaintiff was promoted to the grade of Major.

"(5) Defendant concedes that plaintiff is entitled to credit for sixty-nine (69) retirement points for his retirement year ending June 4, 1972; this includes forty (40) points for weekend drills, fourteen (14) points for summer camp, and fifteen (15) points for a year's active reserve membership. The parties have agreed that plaintiff's records will be corrected to show his entitlement to these retirement points and that no judgment need be entered with respect thereto.

"Upon the foregoing conclusions of findings of fact, the court concludes as a matter of law:

"(A) Plaintiff is not entitled to back pay on the ground that he would have been promoted at least one year earlier but for the voiding of his commission. As the court has many times held, the selection of an officer for promotion is a discretionary function, and we cannot on the facts before us postulate that the discretion to promote plaintiff would have been exercised favorably prior to the time he was actually promoted. *Clinton* v. *United States*, 191 Ct. Cl. 604, 423 F. 2d 1367 (1970).

"(B) Plaintiff is not entitled to recover compensation because he was denied the opportunity to attend the training course at Fort Leavenworth, Kansas, for 131 days in 1971. He actually attended the training course for 131 days in 1973, and payment of compensation because he was not allowed to attend the course in 1971 would amount to double recovery for the same service, *Schmidt* v. *United States*, 192 Ct. Cl. 420, 427 F. 2d 720 (1970). Plaintiff claims that if he had taken the training course in 1971, he would have been assigned to other active duty training in 1973, but the court concludes that the probability of such an assignment is so speculative that plaintiff has not shown himself entitled to recover on this particular claim.

"(C) Since plaintiff is not entitled to recover compensation for the 131 days of active duty training in 1971, it follows that he is likewise not entitled to be paid for travel, per diem, subsistence, and quarters allowance that might otherwise have been paid for the 131 days.

"IT IS THEREFORE ORDERED that plaintiff's motion for summary judgment is granted to the extent that judgment is hereby rendered in his favor for the sum of $1,857 but is otherwise denied.

"IT IS FURTHER ORDERED that defendant's cross motion for summary judgment is granted in that defendant is absolved from any liability to plaintiff except for the $1,857 admittedly due him and for which judgment is hereby rendered in his favor."

No. 177–68. FEBRUARY 14, 1975

Avien, Inc.

Contracts; judicial review; limitation of actions; economic duress; misrepresentation.—The Atomic Energy Commission awarded plaintiff a fixed-price contract for construction of a prototype of a component of a nuclear reactor facility, and when the contract was completed, it designated plaintiff as the supplier of the permanent model. The prime contractor (Kaiser Industries, Inc.) for the entire facility issued a purchase order to plaintiff for construction of a permanent model at a fixed price, the order containing Government-type changes and disputes clauses. Subsequently, Kaiser's obligations under the order were assumed by AEC. Before the AEC Contract Adjustment Board seeking relief under Pub. L. 85–804, plaintiff claimed losses in performing the prototype contract on the ground that it had been induced to enter into the contract by misrepresentations that it would recover its losses on that contract on an award of a second contract for the permanent model, and in a second petition made several claims earlier presented to the Board of Contract Appeals. The Contract Adjustment Board denied the claims for insufficient evidence. Counts I and II of the petition in this court allege causes of action for reversal of the Contract Adjustment Board, for breach of contract and associated mis-

representations, reformation, economic coercion, taking and unjust enrichment in connection with both contracts. Count II seeks reversal of a decision of the AEC Board of Contract Appeals that the work claimed to be extra and the product of changes was done in the course of work either voluntarily done to meet performance specifications or required to be done by the specifications, plaintiff claiming that the decision was erroneous in fact and law and constituted unjust enrichment and a taking in violation of the Fifth Amendment. In Count IV plaintiff alleges procedural error in that not all the Board members attended all the hearings. In a recommended decision filed June 21, 1974 (reported in full at 20 CCF para. 83,145) Trial Judge David Schwartz concluded, in dismissing Count I, that a *de novo* trial was not necessary and that plaintiff merely relabeled claims for which full relief was available before the Board; that it is no bar to finality of decision that the disputes clause appears in a contract which when it was executed was a contract between private parties; that the work for which plaintiff seeks compensation was done voluntarily and that the Government's approval was intended as acknowledgment of compliance with the specifications and not as an assumption of an obligation to pay extra for the cost of the work. As to Count IV, the trial judge concluded that there was no procedural error as alleged in this count since relevant regulations provide for replacement and absence of Board members. Respecting Counts I and III, Trial Judge Schwartz concluded that they are without merit. To the extent that Count I seeks judicial review, decisions under Pub. L. 85–804 are not reviewable; the count is barred by reason of plaintiff's conduct and by the statute of limitations. Plaintiff was not justified, in the circumstances, in relying on any alleged promise; furthermore, assuming the assurance was made, the representation matured and the cause of action accrued when the purchase order was issued at a fixed price, and plaintiff could not remain silent, speculate on the profits to be made under the new contract and then when displeased with the results bring suit; and the count is barred by the statute of limitations, the petition having been filed more than 6 years after issuance of the purchase order. As to the economic coercion claim of Count III, the mere

fact that a contractor is in financial straits and accepts a reduction in price does not constitute duress. This case came before the court on plaintiff's request for review by the court of the said decision, on motions for summary judgment and of the trial judge's orders of July 8, 1974, denying plaintiff's motions for an order directing defendant to implement, perform and consummate the agreed settlement and for summary judgment, having been submitted on the briefs without oral argument of counsel. Upon consideration thereof, since the court agrees with the recommended decision and orders, by Order dated February 14, 1975 the court affirmed and adopted the decision as the basis for its judgment in this case, granted defendant's motion for summary judgment on Counts I and III, denied plaintiff's motion for summary judgment on Counts II and IV and granted defendant's cross-motion, adopted and affirmed the trial judge's orders of July 8, 1974, and dismissed the petition.

No. 14–73. FEBRUARY 14, 1975

General Instrument Corporation

Contracts; interpretation; trade usage; necessity to seek clarification; impossibility of performance; commercial impracticability; release.—Plaintiff contracted with the Federal Aviation Administration to produce and deliver certain radar bright display equipment which utilizes radar information to depict movement of aircraft on cathode ray tube screens. Count 1 of the petition involves the issue of plaintiff's obligation to supply cathode ray tubes (CRT) and image storage tubes (IST) as spare parts under the contract provision calling for the furnishing of an operating set and a spare set of "all the tubes" required for the system. Plaintiff contends that the provision obligated it only to supply as spares tubes of low monetary value (which would exclude the CRT's and IST's). The Contract Appeals Board concluded that the specifications required two sets of all the tubes. Count 2 seeks to recover costs incurred by plaintiff in the production of IST's acceptable under the specifications, plaintiff contending that the specification of the IST was defective or otherwise impossible of performance, and

that the FAA inspection and testing procedures were unreasonable. The Board found no defect in the specification and held that it was not impossible, as a practicable matter, to meet that specification. The Board also found certain inspections by the FAA did hold plaintiff to an unreasonably high standard but concluded that, by reason of a general release executed by the parties, plaintiff was barred from any recovery on that aspect of the claim. In a recommended opinion filed May 31, 1974 (reported in full at 20 CCF para. 83,103), Trial Judge Hal D. Cooper concluded as to Count 1 that nowhere is there any limitation on the value of the tubes to be included in the spare set and the plain and ordinary meaning of "all the tubes" is that *all* the tubes, including IST's and CRT's, not just low-value tubes, are to be supplied in each spare set; that the reference in the contract to low-value tubes is only where the performance requirements of specific tubes were being set out or where it was necessary, for clarity, to differentiate one tube from another; that as to plaintiff's contention of trade usage, the FAA has no established practice of procuring electronic spare parts such as high value tubes by separately priced agreements; and that as to plaintiff's assertion of ambiguity, the provision is not ambiguous, and plaintiff, having adopted without inquiry, an interpretation that was not a reasonable one, cannot invoke the *contra proferentem* rule. As to Count 2, Trial Judge Cooper concluded that plaintiff failed to sustain its burden of proving that a necessary component for the equipment was commercially unavailable and that it had relied on the Government's representation that the component would be available, and concluded that the Board's findings on this phase of Count 2 are supported by substantial evidence. As to the inspection procedures claim, the general release bars plaintiff's claim. This case came before the court on plaintiff's request for review by the court of the recommended decision, on plaintiff's motion and defendant's cross-motion for summary judgment, having been submitted on the briefs and oral argument of counsel. Upon consideration thereof, since the court agrees with the said decision, by order dated February 14, 1975 the court affirmed and adopted the said decision as the basis for its judgment in this case, concluded that plaintiff is not entitled to recover, denied plain-

tiff's motion for summary judgment, granted defendant's cross-motion, and dismissed the petition.

No. 41–73. FEBRUARY 14, 1975

Southwest Welding and Manufacturing Co.

Contracts; interpretation; trade practice; necessity to seek clarification.—Plaintiff seeks additional compensation under a small business contract with the Navy Department for construction of 32 mechanized landing craft. Plaintiff contends that it bid on and accepted the contract under the warranted assumption that it would be able to build the craft in an economically efficient manner in two segments, stern and front, and then weld them together in a continuous circumferential weld, but that the Navy ordered it to build the craft with side and bottom plates so sized and located as to require staggered welds and thereby make two-piece construction economically unfeasible, which it claims is a constructive change. The Armed Services Board of Contract Appeals denied the claim on the ground that the Navy's requirement did not constitute a change but was always in the contract. Plaintiff urges here that there was an established trade practice permitting the building of the craft with a continuous circumferential seam amidships so as to allow two-piece construction. In a recommended opinion filed June 27, 1974 (reported in full at 20 CCF para. 83,157), Trial Judge Philip R. Miller concluded that the Board properly found that plaintiff had no reasonable basis for the belief that defendant had waived the contract requirements for the staggered welded seams. Plaintiff had never previously held a contract for the production of the craft, and therefore could not have relied on an established course of dealings in submitting its bid; the record does not reflect that the Government held out landing craft of prior boatbuilders as a standard for plaintiff to follow; plaintiff's examination of the incompleted and yet unaccepted two-piece craft of prior builders hardly warranted its reliance that it was entitled to do likewise under the specifications on which it bid, since it had neither examined the contract specifications of the other builders nor did it know at the time it submitted its

bid that the prior craft would be accepted by the Navy without modification—at most it furnished a basis for inquiry which plaintiff declined to make. Where such circumstances introduced an obvious ambiguity or inconsistency in the specifications, plaintiff was obligated to bring the situation to the Government's attention before bidding if it intended subsequently to resolve the issue in its favor. Furthermore, the Navy met with plaintiff precisely for the purpose of insuring that there would be no misunderstanding as to its obligation to follow the drawings rather than the one-piece method of construction, and plaintiff agreed in writing that the drawings would be followed as to location of the butts and welds and that if it desired to deviate from the drawings in that respect it must obtain prior Navy approval. This case came before the court on plaintiff's request for review by the court of the recommended decision, on plaintiff's motion and defendant's cross-motion for summary judgment, having been submitted on the briefs and oral argument of counsel. Upon consideration thereof, since the court agrees with the recommended decision, it affirmed and adopted the said decision as the basis for its judgment in this case, and on February 14, 1975, by order, the court concluded that plaintiff is not entitled to recover, denied plaintiff's motion for summary judgment, granted defendant's cross-motion, and dismissed the petition.

No. 220–73. FEBRUARY 14, 1975

Quiller Construction Company, Inc.

Contracts; interpretation.—Plaintiff, on behalf of its subcontractor, seeks additional compensation for alleged extra work performed on the grading and landscaping phases of its fixed-price contract for construction of a family housing project. Plaintiff contends that the contract specifications should reasonably be interpreted to limit the application of soil amendments and fertilizer to areas to be planted with trees and shrubs and the like, and not to areas to be seeded for lawns as required by the contracting officer. The Armed Services Board of Contract Appeals denied this claim, hold-

ing that plaintiff's interpretation was unreasonable, that the relevant provision in the contract was not ambiguous, but even if it were so considered, the ambiguity was patent and one that plaintiff could not properly attempt to resolve without inquiry except at its own risk. Plaintiff also contends that the Government's design for grading work was defective in that the design allegedly failed to prevent damage from improper drainage. The Board denied the claim, holding that the responsibility for the drainage design was a matter which would have been apparent to a reasonably prudent contractor. In a recommended opinion filed October 30, 1974 (reported in full at 20 CCF para. 83,529), Trial Judge Roald A. Hogenson concluded that the Board's decision on each of the claims is supported by substantial evidence and correct as a matter of law. This case came before the court on defendant's motion requesting that the court adopt, as the basis for its judgment in this case, the recommended decision, on plaintiff's motion and defendant's cross-motion for summary judgment, plaintiff having failed to file a request for review thereof by the court and the time for so filing having expired. Upon consideration thereof, without oral argument, since the court agrees with the recommended decision, it adopted the decision as the basis for its judgment in this case. On February 14, 1975, by order, the court denied plaintiff's motion for summary judgment, granted defendant's cross-motion, and dismissed the petition.

No. 394–73. FEBRUARY 14, 1975

Alfred Leggoe, Jr.

Pleading and practice; reference of procedural motions; review by court.—On February 14, 1975 the court issued the following order:

Before KASHIWA, *Judge*, Presiding, KUNZIG and BENNETT, *Judges*.

"Plaintiff's request for review of the trial judge's order on procedural motion, filed January 2, 1975, to review the trial judge's order of December 24, 1974, denying plaintiff's motion for leave to file second amendment to petition so as to aver exhaustion of administrative remedies as to reduction

in grade, came before this court for consideration. Since the trial judge's procedural order contained no statement as provided for in Rule 53(c)(2)(i), plaintiff's request for review should have complied with Rule 53(c)(3)(ii). However, plaintiff made no effort to show the facts, as required by the Rule, necessary 'to an understanding of the extraordinary circumstances warranting prompt review by the court despite the absence from the order of a statement by the trial judge as indicated in subdivision (1) of subparagraph (2) of this paragraph (c).' Consequently, defendant has alleged that it has no idea of why plaintiff feels it necessary to seek review from the court and is, therefore, severely hampered in opposing plaintiff's motion. For this reason alone, plaintiff's motion should be denied.

"Furthermore, it would be useless to proceed with this case until plaintiff has exhausted his administrative remedies with respect to the allegations in his petition. In fact, this court on March 15, 1974, specifically suspended proceedings to allow plaintiff to obtain the administrative relief. This action should remain suspended until such administrative relief is obtained.

"Therefore, for the reasons above stated, plaintiff's request for review of the trial judge's order on procedural motion is hereby denied."

No. 188-74. FEBRUARY 14, 1975

Roy H. Rengstorff

Military pay; correction of military records; promotion.—On February 14, 1975 the court issued the following order:

Before KASHIWA, *Judge*, Presiding, KUNZIG and BENNETT, *Judges*.

"This case comes before the court on defendant's motion, opposed by plaintiff, to dismiss the petition for failure to state a claim upon which relief can be granted. While a major in the United States Army, plaintiff received an adverse officer efficiency report (OER) for the period August 6, 1967, to March 10, 1968. Subsequently, plaintiff was passed over

for promotion to lieutenant colonel by three successive selection boards meeting in 1968, 1969, and 1971. Thereafter, on June 11, 1973, plaintiff was selected for promotion to lieutenant colonel and is presently serving at that rank.

"Plaintiff has argued unsuccessfully to Army officials, including the Army Board for Correction of Military Records, that the OER was arbitrary and capricious and contrary to applicable regulations. He asks this court to order the OER removed from his record, to order his record corrected to show promotion by an earlier selection board, and to award him back pay for the difference between the salaries of a major and lieutenant colonel for the period corresponding to the correction of his record.

"Plaintiff fails to state a claim upon which relief may be granted. Neither before nor after the enactment of Pub. L. 92–415 giving this court certain remand powers have we been willing to meddle in the military's promotion system. *Brenner* v. *United States*, 202 Ct. Cl. 678 (1973), *cert. denied*, 419 U.S. 831 (1974), and cases cited therein; *MacEntee* v. *United States*, 203 Ct. Cl. 752 (1974); *Riley* v. *United States*, 204 Ct. Cl. 865 (Order of Apr. 19, 1974).

"Because we lack authority to promote plaintiff, he is shown to be without a claim for money judgment. Hence his request for removal of the adverse OER cannot be considered. A petition similar to plaintiff's was dismissed in *Clinton* v. *United States*, 191 Ct. Cl. 604, 423 F. 2d 1367 (1970), for failure to state a claim upon which relief could be granted.

"IT IS THEREFORE ORDERED that defendant's motion to dismiss the petition for failure to state a claim upon which relief can be obtained is granted. Plaintiff's petition is dismissed."

Plaintiff's motion for rehearing, motion for leave to file an amended complaint, and suggestion for a hearing *en banc* were denied April 25, 1975.

KUNZIG, *Judge*, concurring:

"I concur in the result of this order while reserving for another day direct confrontation with the problem of the power of this court to promote under a different set of facts."

No. 236–74. FEBRUARY 14, 1975

Designatronics, Incorporated

Renegotiation of excessive profits; counterclaim.—On February 14, 1975 the court issued the following order:

Before KASHIWA, *Judge*, Presiding, KUNZIG and BENNETT, *Judges.*

"This case comes before the court on plaintiff's motion, filed November 11, 1974, to dismiss or in the alternative to strike defendant's counterclaim. Upon consideration thereof, together with the response in opposition thereto, without oral argument, upon the basis of the provisions of the Renegotiation Act, 50 U.S.C. App. § 1218 (1973, Supp. III), and the decision by this court in *Talley Industries, Inc.* v. *United States*, 201 Ct. Cl. 873, 874 (1973).

"IT IS ORDERED that plaintiff's said motion to dismiss or in the alternative to strike counterclaim be and the same is denied."

No. 323–74. FEBRUARY 14, 1975

Francis B. Dove, Jr.

Military pay; correction of military records; exhaustion of administrative remedies.—Plaintiff, formerly an Air Force physician, seeks an order declaring him to be unfit for military duty and a judgment which would direct the Secretary of the Air Force to place his name on the disability retired list in the grade of major with entitlement to appropriate pay. In 1973 a Physical Evaluation Board found that plaintiff was unfit for military duty and recommended retirement with a 50% disability rating; this decision was reviewed by the Air Force Personnel Board which reversed the findings of the Physical Evaluation Board and found plaintiff fit for and recommended return to duty. Plaintiff was relieved of active duty in December 1973 for the convenience of the Government and placed in the Air Force Reserve. On February 14, 1975 the court issued the following order:

Before KASHIWA, *Judge*, Presiding, KUNZIG and BENNETT, *Judges.*

"This case comes before the court on defendant's motion, filed January 6, 1975, to dismiss proceedings or in the alterna-

tive to suspend proceedings. Upon consideration thereof, together with the response in opposition thereto, without oral argument, on the basis of the provisions of 10 U.S.C. § 1552 (a) and the decisions by this court in *Friedman* v. *United States*, 159 Ct. Cl. 1, 29, 310 F. 2d 381, 398 (1962), *cert. denied*, *sub. nom*, *Lipp* v. *United States*, 373 U.S. 932 (1963), and *Montilla* v. *United States*, 198 Ct. Cl. 48, 57, 457 F. 2d 978, 982–83 (1972).

"IT IS ORDERED that defendant's said motion to dismiss proceedings or in the alternative to suspend proceedings be and the same is denied and the case is remanded to the trial division of this court for further proceedings."

No. 331–74. FEBRUARY 14, 1975

Roger C. Myers

Court of Claims jurisdiction; tort claim.—On February 14, 1975 the court issued the following order:

Before KASHIWA, *Judge*, Presiding, KUNZIG and BENNETT, *Judges.*

"This case comes before the court on defendant's motion of December 6, 1974, to dismiss plaintiff's Complaint for Declaratory Judgment asking damages of $300 and costs from defendant arising from alleged seizure of, and damage to, his briefcase, contents thereof, a .32-caliber pistol, and 48 rounds of ammunition. The wrong is alleged to have occurred upon the occasion of plaintiff's arrest when attempting to enter the United States from Juarez, Mexico, on October 23, 1972. None of the aforesaid property has been returned to plaintiff, according to his allegations. Plaintiff is a citizen of the United States presently residing in a federal prison where he is serving a 5-year term.

"Upon consideration of plaintiff's complaint and defendant's motion, it is concluded and adjudged that the motion must be granted. The Court of Claims has no jurisdiction of tort claims. 28 U.S.C. § 1491. This long has been so. *Basso* v. *United States*, 239 U.S. 602 (1916); *Schillinger* v. *United States*, 155 U.S. 163 (1894); *Dennis* v. *United States*, 2 Ct. Cl. 210 (1866); *Martilla* v. *United States*, 118 Ct. Cl. 177 (1950). More recently this has been reiterated in *Somali*

Development Bank v. *United States*, Ct. Cl. No. 650–71, decided December 18, 1974; *Vincin* v. *United States*, 199 Ct. Cl. 762, 468 F. 2d 930 (1972); *Clark* v. *United States*, 198 Ct. Cl. 593, 461 F. 2d 781, *cert. denied*, 409 U.S. 1028 (1972); *Marcee* v. *United States*, 197 Ct. Cl. 363, 455 F. 2d 525 (1972); *Algonac Mfg. Co.* v. *United States*, 192 Ct. Cl. 649, 428 F. 2d 1241 (1970); *Eastport S.S. Corp.* v. *United States*, 178 Ct. Cl. 599, 609, 372 F. 2d 1002, 1010 (1967); *McCreery* v. *United States*, 161 Ct. Cl. 484 (1963). Further, the Court of Claims has no jurisdiction to enter declaratory judgments. *United States* v. *King*, 395 U.S. 1 (1969).

"IT IS THEREFORE CONCLUDED AND ORDERED that plaintiff has not stated a claim for which relief can be allowed within the jurisdiction of the court. Defendant's motion to dismiss is granted. Plaintiff's petition (complaint) is dismissed."

No. 275–73. FEBRUARY 28, 1975

Montgomery Coca-Cola Bottling Co., Inc.

Taxes; income tax; personal holding company; royalties; necessity for filing administrative claim for refund.—On February 28, 1975 the court issued the following order:

Before COWEN, *Chief Judge*, KASHIWA and BENNETT, *Judges*.

"This is a tax case in which the plaintiff claims a refund on the ground that it was not a personal holding company during the years in suit and was not subject to the taxes which defendant collected on income defendant determined was holding company income under Sections 541–543 of the Internal Revenue Code of 1954. Plaintiff is an Alabama corporation. During the years in suit, fiscal years ending September 30, 1965 through September 30, 1969, all of plaintiff's outstanding stock was held by two shareholders, the W. A. Bellingrath Trust and the Estate of Mary E. Bellingrath. These two shareholders and the income beneficiaries of the trust were the partners in two separate partnerships named the Coca-Cola Bottling Company of Montgomery and the Coca-Cola Bottling Company of Andalusia. The suit involves the financial transactions occurring between plaintiff and the two partnerships. For the years in question, plaintiff had entered into lease agreements and sub-bottler's

contracts with the partnerships by which it leased its land, buildings, machinery and fixtures to the partnerships and transferred to the partnerships, among other things, its rights to bottle and sell Coca-Cola for a period of ten years and three months.

"The case comes before the court on the parties' cross-motions for summary judgment. Upon consideration of the motions, the briefs, and oral argument of counsel, the court concludes:

"(1) The legislative background of section 543(a)(6) and its predecessor sections show that the phrase "compensation . . . for the use of, or the right to use" as it is employed in the first sentence of section 543(a)(6) was only intended to apply to amounts received by the corporation as *rental* income. *See* S. Rep. No. 1622, 83d Cong., 2d Sess. 74, 319 (1954); H. Rep. No. 1337, 83d Cong., 2d Sess. 55–56 (1954); S. Rep. No. 2375, 81st Cong., 2d Sess. 65 (1950); H. Rep. No. 1546, 75th Cong., 1st Sess. 6 (1937); H. Doc. No. 337, 75th Cong., 1st Sess. 12 (1937). *See also Medical-Surgical Group, Inc.* v. *Commissioner*, 33 T.C. 888, 894 (1960) (dealing with section 502(f) of the 1939 Code). The first sentence of section 543(a)(6) does not include royalty income, and there is no indication that Congress intended royalties to be treated as rents in this instance.

"(2) Royalties are classified as a type of personal holding company income under section 543(a)(1). The regulations further define 'royalties' to include amounts received for the 'privilege of using patents, copyrights, secret processes and formulas, good will, trade marks, trade brands, franchises, and other like property.' Treas. Reg. § 1.543–1(b)(3). To the extent that the payments made under the sub-bottler's contracts and leases in issue are royalty payments within the meaning of section 543(a)(1) and Treasury Regulation § 1.543–1(b)(3), they constitute personal holding company income for the purpose of the ten percent test provided for in the second sentence of section 543(a)(6).

"(3) The claim that plaintiff and the partnerships engaged in a joint venture was not sufficiently set forth in the petition or in the claims for refund. Consequently, plaintiff is

barred from recovery on this issue. Int. Rev. Code of 1954, § 7422(a); *Commercial Solvents Corp.* v. *United States*, 192 Ct. Cl. 339, 427 F. 2d 749, *cert. denied*, 400 U.S. 943 (1970); *Union Pacific R.R.* v. *United States*, 182 Ct. Cl. 103, 389 F. 2d 437 (1968).

"(4) The total amount received by the corporation under the sub-bottler's contracts did not constitute rent as a result of the fact that the sub-bottler's contracts were incorporated by reference into the lease agreements. It is the nature of the payments, not the label or designation, that controls. *See, e.g., Irving Berlin Music Corp.* v. *United States*, 203 Ct. Cl. 1, 17–18, 487 F. 2d 540, 549–50 (1973), *cert. denied*, 419 U.S. 832 (1974). It is apparent that some part of the gallonage payments made under the sub-bottler's contracts was in exchange for plaintiff's franchise rights. The amount allocable to the franchise right is a question of fact. The parties agreed prior to trial to postpone resolution of this factual question until the case could be presented on the legal issues raised in the motions for summary judgment. It is necessary to remand the case for a trial on this issue, because the question cannot be decided on the documents currently before us.

"IT IS THEREFORE ORDERED that plaintiff's motion for summary judgment is denied and defendant's cross-motion for summary judgment is granted to the extent set out in this order; and

"IT IS FURTHER ORDERED that this case is hereby remanded to the trial judge for his determination and recommended decision, including his findings of fact, on the issue as to whether in view of the provisions of the Term Sub-Bottler's Bottle Contracts and the Lease Agreements and all other pertinent facts, the amount of gallonage payments that are properly allocable or attributable to the use of plaintiff's franchise was five cents per gallon or twenty cents per gallon; and whether the total allocable amount of such payments was less than ten percent of plaintiff's ordinary gross income during each of the years in suit."

Defendant's motion for rehearing and suggestion for rehearing *en banc* was denied April 25, 1975.

APPEAL No. 8–74. MARCH 7, 1975

The Pottawatomi Nation of Indians et al., The Citizen Band of Pottawatomi Indians of Oklahoma, et al., Appellants The United States, Appellee Hannahville Indian Community, et al., Plaintiff-Appellees

Indian claims.—This appeal, in Indian Claims Commission Dockets Nos. 128, 309, 310, 15–N, 15–O, 15–Q, 15–R, 29–L, 29–M, 29–O and 29–P, involves claims arising out of four Pottawatomi treaties. On March 7, 1975 the court issued the following order:

Before COWEN, *Chief Judge*, DURFEE, *Senior Judge*, and NICHOLS, *Judge.*

"This case comes before the court on an appeal from a determination made by the Indian Claims Commission [32 Ind. Cl. Comm. 461 (1973)]. Upon consideration of the record before the Indian Claims Commission, the briefs, and the oral arguments of counsel, the court finds that the factual and legal issues raised by the appellants are in all material respects the same as were decided by this court on December 18, 1974 in *Pottawatomi Nation of Indians, et al.* v. *United States*, 205 Ct. Cl. 765, 507 F. 2d 852, *rehearing denied* January 31, 1975.

"The court also finds that the findings of fact made by the Indian Claims Commission are supported by substantial evidence and that the Commission's conclusions of law are valid and are supported by the findings of fact.

"IT IS THEREFORE ORDERED that the decision of the Indian Claims Commission in this case be and the same is hereby *affirmed.*"

No. 224–74. MARCH 7, 1975

Norman M. Giller & Associates

Contracts; Wunderlich Act review; scope of judicial review; counterclaim; applicability of S & E Contractors, Inc. v. *United States, 406 U.S. 1 (1972).*—This action arose out of a contract with the Agency for International Development to provide certain architectural and engineering services, primarily the review of existing plans and specifications and the supervision of the construction of school buildings in

Panama. On March 7, 1975 the court issued the following order:

Before COWEN, *Chief Judge*, DAVIS and SKELTON, *Judges*.

"This case involves a review of an ASBCA decision [reported at 73–1 BCA para. 10016] under the Wunderlich Act of a contract case. The plaintiff states that the four issues before the Board were:

"1. Does Article II(E) of Contract No. AID/1a–2 (the "Contract"), limit reimbursement of costs to Norman M. Giller & Associates ("the Contractor") to $857,332.37 ("the Ceiling Amount")?

"2. Are the percentage limitations on indirect costs set in Article III(c)(a)(1) and (2) ("Overhead Clause") absolute maximum rates?

"3. If issues (1) and (2) are answered in the negative, are certain indirect costs amounting to $79,685 and actually incurred and paid by the Contractor reimbursable?

"4. If the answers to issues (1) and (2) above are in the negative (and without regard to the answer in issue (3) above), are certain constructive salaries for Mr. and Mrs. Giller, the sole proprietors of the Contractor, (never actually paid by the Contractor to them) reimbursable costs under the contract?

"The Board decided the first two issues in the negative (in favor of plaintiff) and the third issue in the affirmative (in favor of plaintiff) and awarded plaintiff $79,685 as indirect costs, but decided the fourth issue in the negative (against the plaintiff) and denied recovery to plaintiff thereon. The plaintiff appealed to this court only on the fourth issue and accepted the decision of the Board on the first three. The defendant has filed a counterclaim for the recovery of the $79,685 awarded to the plaintiff by the Board under the third issue. The plaintiff has moved to dismiss defendant's counterclaim on the basis of *S & E Contractors, Inc.* v. *United States*, 406 U.S. 1 (1972) and *Roscoe-Ajax Construction Co.* v. *United States*, 204 Ct. Cl. 726, 499 F. 2d 639 (1974), claiming that the third and fourth issues are separate and unrelated to each other, and that the acceptance by plaintiff of the award of the Board of $79,685

in satisfaction of the third claim prevents defendant from litigating it here because of the doctrine of *S & E Contractors, Inc., supra.* The case is before us on plaintiff's said motion to dismiss defendant's counterclaim.

"The court concludes that plaintiff's claim for $79,685 as indirect costs under the third issue is only a part of the overhead or indirect costs and that the claim of plaintiff for constructive salaries under the fourth issue is also a claim for overhead or indirect costs comparable to rent, depreciation, automobile expenses, utility bills, etc., and are not separable. When the plaintiff appealed to this court to set aside that part of the Board's award denying it a recovery of overhead or indirect costs for constructive salaries, the defendant was entitled to appeal that part of the Board's decision awarding $79,685 to plaintiff for 'other overhead or indirect costs.' When the plaintiff brings a part of a *single* dispute to this court, the defendant has a right to litigate the other part. However, in prosecuting its counterclaim, the defendant will not be allowed to litigate the first and second issues listed above.

"Accordingly, plaintiff's motion to dismiss defendant's counterclaim is denied. *See S & E Contractors, Inc.* v. *United States, supra,* and *Roscoe-Ajax Construction Co.* v. *United States, supra.* The case is remanded to the trial judge for further appropriate proceedings."

No. 121–72. MARCH 14, 1975

Thomaston Special Products, Inc., Successor-in-Interest to Precision Products Industries, Inc.

Pleading and practice; stipulation of facts; acceptance of by court.—On March 14, 1975 the court issued the following order:

Before DAVIS, *Judge*, Presiding, SKELTON and KASHIWA, *Judges.*

"This case comes before the court on the merits on the parties' stipulation of facts, having been submitted on the briefs and oral argument of counsel. Upon consideration thereof, the court does not feel that it can properly dispose of this case on the unelaborated and incomplete stipulation

presented by the parties and therefore is unwilling to be bound by it. See *Swift & Co.* v. *Hocking Valley Ry.*, 243 U.S. 281, 289 (1917); *Kaminer Constr. Corp.* v. *United States*, 203 Ct. Cl. 182, 197, 198, 488 F. 2d 980, 988, 989 (1973). The case should be tried so that all relevant facts are placed in the record and the full circumstances exposed.

"IT IS THEREFORE ORDERED that this case be and it is returned to the trial division for trial."

Plaintiff's motion for rehearing and suggestion for rehearing *en banc* was denied April 25, 1975.

No. 405–72. MARCH 14, 1975

Anne E. Miller

Civilian pay; dismissal.—Plaintiff, a former employee of the Internal Revenue Service, seeks back pay and reinstatement to her former position of Tax Examiner, on the grounds that the decision to remove her was not supported by substantial evidence and that her removal was based upon unwarranted and unconstitutional requests of supervisory personnel that she undergo a psychiatric examination. The letter of proposed removal charged: (I) that she caused dissension, discord and disruption of official business in violation of Sec. 1942.52 of the Rules of Conduct for IRS employees, (II) that she failed to cooperate/comply with official requests of properly constituted authority in violation of said Sec. 1942.52, and (III) that she committed insubordination and refusal to comply with a direct order to report for a fitness for duty examination. Following written and oral replies plaintiff was removed from her position. On appeal, the Regional Office of the Civil Service Commission sustained the removal. The CSC Board of Appeals and Review also upheld the removal action. On March 14, 1975 the court issued the following order:

Before DAVIS, *Judge*, Presiding, SKELTON and KASHIWA, *Judges*.

"This case comes before the court on defendant's motion, filed July 18, 1974, and plaintiff's cross-motion, filed October 17, 1974, for summary judgment, having been submitted on the briefs and oral argument of counsel. Upon considera-

tion thereof, it is concluded that there was more than substantial evidence to support charges II and III, and these charges were sufficient to warrant plaintiff's removal as the Civil Service Commission held. Nor was the action on those charges arbitrary or capricious. No procedural violations are alleged or shown. It is therefore unnecessary to consider whether Charge I, as upheld, was adequately supported by substantial evidence or whether it would be enough, standing by itself, to sustain the removal.

"IT IS THEREFORE ORDERED that plaintiff's cross-motion for summary judgment is denied, defendant's motion for summary judgment is granted and plaintiff's petition is dismissed.

No. 22–73. MARCH 14, 1975

Charles Joseph Moderacki

Civilian pay; dismissal.—Plaintiff, a former postal employee, was given notice of his proposed removal and about a year later he was removed from service, the reason for the delay being the pendency of related criminal proceedings (gambling) brought against him, as to which he was eventually found not guilty. Plaintiff unsuccessfully appealed the dismissal through the Post Office Department and the Civil Service Commission. Plaintiff seeks reinstatement and back pay from the date of his removal, alleging various procedural errors in the administrative proceedings and lack of substantial evidence to support his removal. On March 14, 1975 the court issued the following order:

Before NICHOLS, *Judge*, Presiding, KUNZIG and BENNETT, *Judges*.

"This case comes before the court on plaintiff's motion, filed July 11, 1974, and defendant's cross-motion, filed December 10, 1974, for summary judgment, having been submitted on the briefs and oral argument of counsel. Upon consideration thereof, it is concluded that plaintiff has failed to present any material triable issue of fact and that the administrative decision is entitled to finality as being supported by substantial evidence, being neither arbitrary nor capricious and being correct as a matter of law.

"IT IS THEREFORE ORDERED that plaintiff's motion for summary judgment is denied, defendant's cross-motion for summary judgment is granted and plaintiff's petition is dismissed."

No. 182–73. MARCH 14, 1975

Delores Milbourn

Civilian pay; dismissal; failure to exhaust administrative remedies.—Plaintiff, a former GS–4 clerk in the Security Office of the Philadelphia Naval Shipyard, was notified of a proposed removal from her position by reason of her physical inability to perform the full range of duties as outlined in her position description. Plaintiff's grievance appeal, after an evidentiary hearing, was denied; she appealed to the Regional Office of the Civil Service Commission and, upon hearing, the agency's decision to effect the separation was sustained; the CSC Board of Appeals and Review affirmed the decision of the Regional Office. Plaintiff asks this court to reverse her involuntary separation, alleging, first, that her dismissal was arbitrary, capricious and unsupported by substantial evidence in that when separated she was, in fact, physically able to fully perform the duties of her job, and, second, that the regulation under which she was dismissed was unconstitutionally vague. Defendant asserts, *inter alia*, that in resisting dismissal, plaintiff had never challenged the validity of the regulation under which she was dismissed, i.e. 5 C.F.R. § 752.104(a), a codification of the Lloyd-LaFollette dismissal standard embodied in 5 U.S.C. § 7501(a) that an individual in the competitive service may be removed only for such cause as will promote the efficiency of the service, and that accordingly the vagueness issue cannot be raised in this court. In a recommended decision filed May 10, 1974, Trial Judge George Willi concluded that the Supreme Court's decision in *Arnett* v. *Kennedy*, 416 U.S. 134 (1974), renders the vagueness issue moot. In recommending entry of a judgment dismissing the petition, Trial Judge Willi also points out that the record discloses not only that plaintiff did not contend at the administrative level that she was able to perform the full range of her assigned duties at the time of her

separation but that she affirmatively and repeatedly conceded that she was not; and accordingly concluded that this issue is foreclosed by virtue of her previous silence as well as by active contravention of her own prior position. This case came before the court on plaintiff's request for review by the court of Trial Judge Willi's recommended decision, having been submitted on oral argument and the briefs of counsel. Upon consideration thereof, since the court agrees with the recommended decision, the court on March 14, 1975, by order, affirmed and adopted the said decision as the basis for its judgment in this case, concluded and ordered that plaintiff is not entitled to recover and dismissed the petition. Plaintiff's motion for rehearing was denied June 13, 1975.

No. 421–73. MARCH 14, 1975

Antranik Malajalian

Pleading and practice; non-resident plaintiff; order directing plaintiff to appear to be examined on oath.—On March 14, 1975 the full court issued the following order:

"This case comes before the court on defendant's motion for an order requiring plaintiff to appear and give testimony before a trial judge. Upon consideration of the motion and plaintiff's opposition thereto, IT IS ORDERED:

"(1) The plaintiff, Antranik Malajalian, is hereby directed, pursuant to 28 U.S.C. § 2504, to appear before a trial judge of this court in Boston, Massachusetts, in order that he may be examined on oath by the attorney for defendant as to all matters pertaining to plaintiff's claim.

"(2) The time and place of the hearing in Boston shall be fixed by the trial judge, and written notice thereof shall be given by letter mailed to the parties at least forty (40) days prior to the date of the hearing.

"(3) In order to avoid the necessity of a second trip by plaintiff to the United States in the event a trial is ordered in this case, plaintiff may, at the completion of the examination by defendant's attorney at the Boston hearing, present any admissible evidence, including his own testimony, which plaintiff would offer in support of his claim at such a trial.

"(4) All proceedings at the hearing in Boston shall be reported and the transcript thereof filed with the clerk in accordance with the provisions of Rule 122.

"(5) Plaintiff shall not be required to appear in Boston pursuant to this order unless the defendant shall agree to pay for plaintiff's air transportation (coach fare) from Beirut, Lebanon, to Boston, Massachusetts, and return, or to provide plaintiff such free transportation in aircraft owned or controlled by the United States. Within twenty (20) days from the date of this order, the defendant shall file with the clerk a notice stating its willingness to pay or provide such air transportation without expense to plaintiff and describing how and when the transportation or the cost thereof will be provided. At least thirty (30) days prior to the date fixed by the trial judge for the hearing in Boston, the defendant shall send the American Embassy in Beirut a copy of this order and a signed copy of its notice of willingness to provide plaintiff's air transportation to and from the hearing and request that the Embassy deliver such papers to the plaintiff."

On March 19, 1975 defendant filed a notice of willingness to pay transportation costs of plaintiff.

No. 456–73. MARCH 14, 1975

Donald C. Goewey

Military pay; correction of military records; disability claim; limitation of actions.—Plaintiff, a captain in the Regular Army, tendered his resignation for the good of the service on January 19, 1951. The resignation was accepted and plaintiff was separated under other than honorable conditions effective March 5, 1951. Commencing January 10, 1960 plaintiff applied for administrative relief, challenging his separation on the basis that he was mentally disabled at the time. In June 1971 the Air Force Board for Correction of Military Records recommended that plaintiff's records be corrected to show that on March 5, 1951 he was unfit to perform the duties of his office, rank, grade or rating by reason of physical disability, VA Code 9404, rated at 10%, and that

he was discharged for physical disability on March 5, 1951 with entitlement to disability severance pay. In December 1972 the Board of Veterans Appeals found that plaintiff had not established entitlement to a starting date for compensation benefits prior to January 10, 1960. In his suit in this court plaintiff claims entitlement to total permanent disability from March 5, 1951. On March 14, 1975 the court issued the following order:

Before DAVIS, *Judge*, Presiding, SKELTON and KASHIWA, *Judges.*

"This case comes before the court on plaintiff's motion for summary judgment, filed August 7, 1974, defendant's cross-motion for summary judgment, filed October 16, 1974, and plaintiff's motion to transfer Count II of his petition to the District Court, filed August 7, 1974, having been submitted on the briefs and oral argument of counsel. Upon consideration thereof, it is concluded as follows:

"1. Except as indicated in paragraph 2 *infra*, both parties' motions for summary judgment are denied without prejudice and the case is returned to the trial division for trial and determination on the following issue only: "Was plaintiff under legal disability, within the meaning of 28 U.S.C. § 2501 (third paragraph), from the time he was released from St. Elizabeths Hospital in 1965 until at least three years prior to the filing of the present suit on December 3, 1973, so that his claim is not barred by limitations?" The trial judge shall make findings of fact on this issue and, if he deems it appropriate, write an opinion, and then return the case to the court for further proceedings.

"2. Defendant's motion for summary judgment with respect to plaintiff's veteran's compensation is granted with prejudice. Plaintiff's motion to transfer his claim relating to his national service life insurance policy is held in abeyance pending the outcome of the proceedings on his alleged legal disability.

"IT IS SO ORDERED."

Defendant's motion for amendment of the foregoing order was denied April 25, 1975.

APP. No. 11–74. MARCH 14, 1975

The Seminole Indians of the State of Florida

Indian claims; appeal from Indian Claims Commission; scope of appellate review; Macomb area in Florida.—On March 14, 1975 the court issued the following order:

Before DAVIS, *Judge*, Presiding, NICHOLS and KUNZIG, *Judges*.

"This case comes before the court on appeal by the Seminole Indians of the State of Florida from a final order of the Indian Claims Commission, dated January 16, 1974, [33 Ind. Cl. Comm. 70, Instrument No. 38], which dismissed appellant's claim for the 5-million-acre 'Macomb area'. The case has been submitted and is considered on the briefs and oral argument of counsel.

"Insofar as the Indian Claims Commission, with respect to the part of its determination from which appeal is taken, decided ultimate issues of law, the court agrees with those rulings. Insofar as the Commission found facts, the court holds that those findings are supported by substantial evidence in the record as a whole and that the Commission did not err in omitting or failing, as appellant charges, to make other relevant findings. On the foregoing basis and on the record before it, the court upholds the Commission's determination that (a) the United States never intended to grant, and the Seminoles never acquired, recognized title to the so-called Macomb reservation; (b) the so-called 'Everett Amendment' did not in any way authorize or require grant of such title; (c) Congress never authorized in any other enactment the grant of recognized title to the Macomb area; (d) the Seminoles never acquired such title under executive orders; and (e) appellant has failed to show that the Seminoles had, at the times relevant to this claim, any compensable right, title or interest in the 5-million-acre Macomb area.

"The claim that the Seminoles acquired, after 1832, aboriginal Indian title to the so-called Macomb reservation was not presented to the Commission and is therefore not properly before us; in any event it is overwhelmingly contradicted by the record. The claim for recovery on the basis of breach of contract was likewise not presented to the Commission.

"As for the claim based on the fair and honorable dealings clause of the Indian Claims Commission Act, it is far from certain that this issue was actually or properly raised below. It is not mentioned in the pleadings nor can we find it, in any significant form, in the written submissions to the Commission, but it was apparently referred to in passing in oral argument before the Commission by appellant's counsel. The Commission does not discuss the question, evidently considering that the issue was not before it. If such a claim is properly before us on this appeal, we cannot reverse the Commission on that ground. The appellants rely on evidence in the record which shows that U.S. General Macomb in 1839 and U.S. Colonel Worth in 1842, in order to quiet the Seminoles, represented to them that they would be left undisturbed on the area in issue and would not be required to remove to the West, concealing that removal West remained the Government's fixed policy. The deception, if any, which might have fallen short of fair and honorable dealings, was in the concealment of the removal policy and not in any unfulfilled promise of a permanent Florida habitation. While removal of Seminoles to the West continued after 1842, the claimants now before us claim in right of Seminoles who never left Florida. The claims, if any, of Western Seminoles are not before us on this appeal. In the circumstances, whatever claim based on fair and honorable dealings any Indian may have does not come before us in connection with the Macomb tract which is the subject of the instant appeal.

"IT IS THEREFORE CONCLUDED AND ORDERED that the said order and decision of the Indian Claims Commission be and the same is *affirmed*."

On April 25, 1975 the court denied appellant's motion for rehearing of the foregoing order.

No. 155–74. MARCH 14, 1975

James O. Ming

Civilian pay; reduction-in-force.—Plaintiff, a former employee of the Naval Underwater Systems Center, was notified of his proposed separation from the service by reason of a

reorganization resulting in abolishment of his position. Plaintiff contested his separation administratively, appealing the action to the Regional Office of the Civil Service Commission and, upon denial by the Regional Appeals Examiner, to the CSC Board of Appeals and Review which also denied the appeal. Plaintiff seeks an order of the court directing his reemployment at the same grade level he previously held, recovery of lost wages, punitive damages, plus interest and costs, and, alternatively, a trial *de novo* in this court. On March 14, 1975 the court issued the following order:

Before NICHOLS, *Judge*, Presiding, KUNZIG and BENNETT, *Judges*.

"This case comes before the court on defendant's motions, filed August 19, 1974 to dismiss and for summary judgment, and on plaintiff's cross-motion, filed November 4, 1974 for summary judgment, having been submitted to the court on the briefs and oral argument of counsel. Upon consideration thereof, it is concluded that plaintiff has failed to state a claim upon which relief can be granted and that the administrative action is supported by substantial evidence and is not arbitrary, capricious or so grossly erroneous as to imply bad faith.

"IT IS THEREFORE ORDERED that plaintiff's cross-motion for summary judgment is denied, defendant's motions to dismiss and for summary judgment are granted and plaintiff's petition is dismissed."

On June 10, 1975 plaintiff filed a petition for writ of certiorari.

No. 514–71. MARCH 21, 1975

Chester Vanada, et al.

Taking; just compensation; property along navigable river; ordinary high-water line.—Plaintiffs seek to recover just compensation for an alleged taking by defendant of approximately 12 acres of tillable land lying between elevations 355 and 362.6 m.s.l. (mean sea level) on a plot of land (tract 108) located on the Ohio River. Defendant condemned this land as necessary for enhancing navigation and commerce along the navigable Ohio River in connection with construction of the Newburgh Locks and Dam. The condemnation proceedings were the subject of litigation (*see United States*

v. *124.84 Acres of Land*, 387 F. 2d 912 (1968)). In said proceedings plaintiffs maintained that tract 108 consisted of at least 60.5 acres, with some 12 to 15 acres thereof lying below elevation 362.6 m.s.l. which elevation figure plaintiffs challenged as not reflecting a correct ordinary high-water line on said tract. The district court failed to decide plaintiffs' properly raised allegation in this respect. In an order reported at 202 Ct. Cl. 1121 (1973), this court determined that plaintiffs are not barred by the doctrine of *res judicata* from litigating in this court the question of the location of the ordinary high-water line (OHWL) on tract 108. In a recommended opinion filed November 21, 1974, following a trial, Trial Judge Thomas J. Lydon concluded, in view of the particular facts and applying established legal principles thereto, that the land in question was above the OHWL and that plaintiffs are entitled to judgment against defendant for just compensation for the taking of 10.5 acres of their land. On March 21, 1975 the court issued the following order:

"Following the filing of findings, an opinion, and recommended conclusions of law by Trial Judge Thomas J. Lydon on November 21, 1974, this case comes before the court on a stipulation of the parties filed March 19, 1975, signed on behalf of plaintiffs and the defendant by the respective attorneys of record, in which it is stated that an offer was submitted by plaintiffs to settle this case, which offer was thereafter duly accepted on behalf of defendant, whereby plaintiffs agreed to accept the sum of $7,350, plus interest at the rate of 6 percent per annum from June 25, 1965, until March 3, 1975, together with the sum of $2,000 as litigation costs and attorney's fees, in full settlement of all claims set forth in the petition, and defendant consented to the entry of judgment in the amounts and manner set out above.

"IT IS THEREFORE ORDERED that judgment be and the same is entered for plaintiffs in the sum of seven thousand three hundred and fifty dollars ($7,350), together with simple interest thereon at the rate of 6 percent per annum from June 25, 1965, until March 3, 1975, together with the additional sum of two thousand dollars ($2,000) for litigation costs and attorney's fees, provided that plaintiffs may obtain payment of such award only upon tender of a deed to such property as was taken by defendant in such form as the At-

torney General may deem necessary to assure the defendant a valid fee simple title."

No. 578–71. MARCH 21, 1975

Amco Electric Company

Renegotiation of contracts; failure to file bond to stay execution of order of Renegotiation Board.—On March 21, 1975 the court issued the following order:

Before COWEN, *Chief Judge*, DAVIS and NICHOLS, *Judges*.

"This renegotiation case comes before the court on defendant's motion for judgment in aid of execution of an order of the Renegotiation Board because of plaintiff's failure to file a bond to stay the Board's order. Plaintiff has filed no opposition and, upon consideration of defendant's motion, plus certified copies of accompanying documents, the court finds:

"(1) On June 23, 1969, the Renegotiation Board issued its order in which it determined that plaintiff had realized excessive profits in the amount of $300,000 for its fiscal year ended April 30, 1974.

"(2) On July 2, 1969, the Internal Revenue Service informed the Board that, for purposes of Federal income tax, plaintiff was entitled to a tax credit of $149,409.

"(3) Plaintiff filed its petition under 50 U.S.C. App. § 1218 (1970, Supp. III) for a redetermination of the excessive profits determined by the Board but plaintiff did not file a bond to stay the execution of the Board's order. Instead, in a series of applications beginning on July 22, 1969, and continuing for several years thereafter, plaintiff sought and obtained extensions of time for payment of the amount of excessive profits as determined by the Board.

"(4) By letter of October 8, 1974, the Renegotiation Board informed plaintiff that no further extensions of time would be granted and that the matter would be referred to the Department of Justice for collection.

"(5) The principal balance due on the amount determined by the Board as excessive profits is the sum of $82,968.92, upon which interest has been accruing since August 20, 1973, at the rate of four percent per annum.

"Upon the basis of the foregoing findings, IT IS ORDERED that defendant's motion for judgment is granted and judgment is hereby entered for defendant in the amount of $82,968.92, plus interest, as provided by law. 50 U.S.C. App. § 1215(b)(2) (1970, Supp. III)."

No. 598-71. MARCH 21, 1975

Mancon Liquidating Corporation (Formerly Intercontinental Manufacturing Company, Inc.)

Renegotiation of contracts; bond to stay execution of order of Renegotiation Board.—On March 21, 1975 the court issued the following order:

Before COWEN, *Chief Judge*, DAVIS and NICHOLS, *Judges*.

"This case comes before the court on defendant's motion for judgment in aid of execution of an order of the Renegotiation Board. Upon consideration of the motion, plaintiff's opposition thereto, and supporting documents, the court finds:

"(1) On May 7, 1970, the Renegotiation Board determined that the plaintiff realized excessive profits in the amount of $1,500,000 for plaintiff's fiscal year ended July 31, 1967.

"(2) Plaintiff filed its petition under 50 U.S.C. App. § 1218 (1970, Supp. III) for a redetermination of such excessive profits but plaintiff failed to file the bond required by Section 108 of the Act and by Rule 26 of this court.

"(3) About 18 months before the Board's decision, plaintiff entered into a contract to sell substantially all of its assets. An escrow fund was created to cover any renegotiation liabilities of the selling corporation; this fund consisted of a part of the purchase price (in the form of stock of the buyer corporation), which was valued at the time the fund was created at $1,200,000. After the sales contract was executed, plaintiff distributed to its shareholders the purchase price received, minus the shares placed in escrow, and ceased doing business. The escrow account remains in existence, but the shares placed therein now have only a nominal value. Relying on *Sandnes' Sons, Inc.* v. *United States*, 199 Ct. Cl. 107, 462 F. 2d 1388 (1972), plaintiff opposes defendant's motion on the ground that "the financial condition of the contractor may be such as to preclude continuing litigation." Plaintiff

acknowledges that the value of the shares held in escrow is nominal.

"Upon consideration of the foregoing findings of fact, the court concludes that plaintiff has not shown sufficient facts to bring itself within the rule of the *Sandnes*' case and that the escrow fund containing assets of dwindling value is not sufficient to give the Government the assurance of the bond required by law. Since the Internal Revenue Service has found that plaintiff is not due any income tax credit, the court concludes that defendant is entitled to judgment in the sum of $1,500,000, plus interest, as provided by law from June 6, 1970.

"IT IS THEREFORE ORDERED that judgment is entered for defendant in the amount of $1,500,000 with interest thereon, as provided by law from June 6, 1970. 50 U.S.C. App. § 1215 (b) (2) (1970, Supp. III)."

No. 343–72. MARCH 21, 1975

Weather Engineering Corporation of America and Weather Engineering Corporation of Canada, Ltd. (University of Wyoming, Third-party Defendant)

Patents; infringement.—In this case plaintiffs sue the United States for infringement of their U.S. patent No. 3,441,214 relating to a cloud seeding process to produce rain. On March 21, 1975 the court issued the following order:

Before COWEN, *Chief Judge*, DAVIS and NICHOLS, *Judges*.

"This case comes before the court on a motion for summary judgment, filed December 17, 1974, by the third-party defendant, University of Wyoming. Upon consideration thereof, together with defendant's response thereto, without oral argument, it appears that defendant expressly concedes that the University of Wyoming has not infringed the patent in the performance of contract No. 14–06–D6801, and that plaintiffs in effect concede that result by their deliberate failure to oppose the motion. Therefore, in accordance with the order entered herein on January 31, 1975, dismissing other third-parties as parties to this case.

"IT IS ORDERED that the motion for summary judgment filed herein by the third-party defendant, University of Wyoming, be and the same is granted and the said third-party is dismissed as a party to this case.

"IT IS FURTHER ORDERED that the third-party's request for an award of costs be and the same is denied."

No. 37–72. MARCH 28, 1975

National Indemnity Company, Bank of America, Third-party Defendant

Contracts; performance and payment bond surety; bank assignee of defaulting contractor; recovery of public funds paid by mistake.—On March 28, 1975 the court issued the following order, as amended:

Before COWEN, *Chief Judge*, DAVIS and NICHOLS, *Judges*.

"This case comes before the court on the motion for partial summary judgment, filed July 31, 1974, by the third-party defendant, Bank of America, who was assignee (under the financing institution exception in 31 U.S.C. § 203 and 41 U.S.C. § 15) of Jack Charleston, a defaulting contractor, under Navy contracts N 62473–70–C–1338, N 62473–70–C–1345, and N 62473–70–C–2346 (hereinafter contracts C–1338, C–1345, and C–2346 respectively).

"Plaintiff, National Indemnity Company was Charleston's Miller Act (40 U.S.C. §§ 270a–270e) performance and payment bond surety. The dispute between the surety and the Government involves at least nine of Charleston's contracts, whereas the partial summary judgment motion pertains only to two of the three contracts involving Bank of America.

"Two issues are presented by the motion for partial summary judgment: (1) can the Government recover $19,080.00 it claims it may have mistakenly paid the Bank on March 3, 1971, pursuant to a voucher dated November 27, 1970, on contract C–2346; and (2) as between surety and assignee Bank, who gets the $8,421.37 contract balance under contract C–1345.

"On the first issue, the Government has consented to the granting of summary judgment for the Bank, since, if the

money were properly paid, the Government has no claim to it; and since, if the money were erroneously paid, the decision in *Great American Ins. Co.* v. *United States*, 203 Ct. Cl. 592, 492 F. 2d 821 (1974), is indistinguishable from the facts in this case and under that decision 41 U.S.C. § 15 bars the Government recovery of funds erroneously paid to assignee banks and financial institutions under public contracts.

"On the second issue, each party takes a different position: (1) the assignee Bank says that the surety is not entitled to priority under *United States Fid. & Guar. Co.* v. *United States*, 201 Ct. Cl. 1, 475 F. 2d 1377 (1973), since the surety has not paid all of the bills; (2) the surety asserts that it is entitled to the money since it has paid all bills presented under contract C–1345, as required by *U.S. Fidelity*, *supra;* and (3) the Government, while saying that *U.S. Fidelity*, controls, asserts that one cannot tell if all the bills under contract C–1345 have been paid until all of the nine plus contracts involving the Navy, Charleston, and surety have been settled, particularly since there is a general tax lien of $10,392.29, plus interest, allegedly covered by the Miller Act bonds of the surety which has not been paid.

"The pre-trial statements of the parties disclose even more factual disputes: (a) a dispute over whether the Navy properly charged and offset liquidated damages against remaining contract balances; (b) the reasonableness of Government costs to complete; (c) claims for change orders; (d) claims for misrepresentation by the Navy that there were no liquidated damages; (e) claims that two progress payments checks were forged and not received by contractor; and (f) apparently quite a few other factual disputes.

"Since the facts decisive of entitlement to the contract balance under C–1345 are in dispute, and since the amount of the balance is also in dispute, summary judgment is not appropriate at this time, except as to the $19,080.00 payment under contract C–2346.

"IT IS THEREFORE ORDERED that partial summary judgment on the third-party defendant's motion to dismiss the Government's cross-claim for $19,080.00 be granted and that the Government's cross-claim to recover $19,080.00 from the third-party defendant is hereby dismissed. It is further

ordered that summary judgment on all other issues be denied without prejudice pending resolution of the factual disputes by stipulation or trial."

Nos. 97–74 AND 98–74. MARCH 28, 1975

Helen Hamel
Hiroo Yamamoto

Agency decision not to fund project; judicial review.—On March 28, 1975 the court issued the following order:

Before COWEN, *Chief Judge*, DAVIS and NICHOLS, *Judges*.

"These actions are before the court on defendant's motion for summary judgment, objections of both plaintiffs thereto, and defendant's response.

"Plaintiffs, research chemists, were employed by the Veterans Administration (VA) at its Brooklyn hospital, on a research project entitled 'Origin of Foam Cells in Rabbit Atherosclerosis Lesions.' It was decided to terminate this project and plaintiffs, fearing they would be laid off, drafted and submitted another project they entitled 'Derivation and Role of Foam Cells in Atherosclerosis.' This project was rejected for funding in a decision plaintiffs characterize as arbitrary and capricious, and plaintiffs were removed from employment under Reduction in Force (RIF) procedure. Plaintiffs exhausted their appeal rights to the Civil Service Commission and brought these actions under 28 U.S.C. § 1491.

"Plaintiffs attack the decision not to fund their project rather than the decision to remove them by RIF. Laws and regulations governing the proper conduct of RIF's are not here relevant. Assuming the decision not to fund to be proper, they adduce no reason why they should not be RIF'd. However, they show no reason why an agency decision not to fund a project should be subject to judicial review, nor do they show what standards a court should apply, supposing review to be permissible under any circumstances. In general, we believe that agencies enjoy discretion how to spend funds made available by Congress, within applicable authorizing and appropriating legislation. If there be any instance when a decision not to fund

a project is subject to judicial review, plaintiffs have not shown what it is, nor what procedures in making such decisions are prescribed by law or regulation for their protection, or what constitutes due process in this area. We do not deem it appropriate for us to investigate whether VA officials were wise in not funding the project, or whether they failed to consider plaintiffs' project as carefully as they might have done.

"Accordingly, upon consideration of the administrative record, and the briefs of the parties, but without oral argument, we determine that there is no issue of fact requiring trial. It is ordered and adjudged that the petitions of both plaintiffs are dismissed."

No. 840–71. APRIL 15, 1975

Julius Petrofsky, d/b/a Petrof Trading Co.

Pleading and practice; procedural motions; discretion of trial judge.—On April 15, 1975 the court issued the following order:

Before SKELTON, *Judge*, Presiding, KUNZIG and BENNETT, *Judges*.

"The court has before it two requests for review of actions of the trial judge and one motion, as follows:

(1) Plaintiff's request of March 6, 1975, for review of the order of the trial judge denying plaintiff's motion for a protective order.

(2) Plaintiff's motion of March 13, 1975, for leave to file an affidavit in support of the motion or request of March 6, 1975.

(3) Plaintiff's request of March 17, 1975, for prompt review of the order of the trial judge, entered March 10, 1975, denying plaintiff's motion for leave to file a motion for partial summary judgment under his Count III.

"Plaintiff's motion and requests for review are timely filed. Defendant has not responded thereto, as permitted by the Rules of the Court of Claims. Rules 52(d); 53(c)(4).

"The court has carefully considered the motion and requests for review and the representations made by plaintiff

therein, and the authorities cited by plaintiff. The court considers that the matters are properly within the discretion of the trial judge and that he has not abused his discretion in his rulings. The court is deeply concerned about the delay in disposing of this case arising from a contract entered into in August 1960, and in suit since 1971, and a portion of which was the subject of a decision by the court on December 19, 1973, in *Petrofsky* v. *United States*, 203 Ct. Cl. 347, 488 F. 2d 1394 (1973). The court considers a further piecemeal adjudication of the suit not in the best interests of the parties or the administration of justice. Accordingly,

"IT IS ORDERED that the motion and requests for review be and they are hereby denied.

"IT IS FURTHER ORDERED that the case shall go to trial and that any and all further procedural rulings on requests for review will be denied, but without prejudice to their preservation and renewal upon consideration by the court of the final findings and recommended decision of the trial judge.

"IT IS FURTHER ORDERED that any future dispositive motions in this case, if any, shall be referred, pursuant hereto and under Rule 54(a), to the trial judge for his recommended decision before consideration by the court."

No. 298–73. APRIL 18, 1975

Grunley-Walsh Construction Company, Inc.

Contracts; disputes; timeliness of administrative appeal; administrative discretion to waive lack of timeliness.—This suit involves a 1964 fixed-price contract between plaintiff and General Services Administration for remodeling a building in Washington, D.C. for the Smithsonian Institution. The claim is for increased direct cost to plaintiff and a subcontractor of performing alleged extra work relating to a spray pump and humidifier system. Plaintiff's appeal was dismissed by the GSA Board of Contract Appeals as untimely, the Board holding that it did not have authority to waive the 30-day appeal provision of the Disputes clause. Plaintiff contends that the contracting officer's letter of April 5, 1967 was not a valid and effective decision sufficient to invoke the

mandatory Disputes procedure. In a recommended decision filed December 16, 1974 (reported in full at 20 CCF para. 83,-540), Trial Judge Harry E. Wood concluded that the Board was correct in holding that the said letter, in direct response to plaintiff's repeated demands, was a final and appealable decision within the meaning of the Disputes clause; that plaintiff's contention that its later claim submitted to the contracting officer was not the claim rejected by the letter is incorrect because installation of the proper pump and humidification system was the subject of both claims; that the holding of the Board that it lacked authority to waive the appeal provision of the Disputes clause is contrary to many opinions of this court, although in accordance with the Board's own, long-standing course of decision; that the Board should have considered all the relevant circumstances when the concept of discretion-to-waive was invoked; and that the cause should be remanded to the Board with directions to exercise its discretion respecting waiver of plaintiff's failure to timely appeal the contracting officer's decision of April 5, 1967. This case came before the court on the joint motion of the parties that the court adopt the said recommended decision, on defendant's motion for summary judgment. Upon consideration thereof and without oral argument, since the court agrees with the recommended decision, by Order dated April 18, 1975 the court granted the joint motion of the parties to the extent that it adopted the recommended decision as the basis for its judgment in this case, denied defendant's motion for summary judgment and remanded the case to the GSA Board of Contract Appeals pursuant to this court's Rule 149 for further proceedings as set forth in the decision, with proceedings in this court suspended accordingly.

No. 851–71. APRIL 25, 1975

Kenosha Auto Transport Corporation

Ethics; disciplinary rules of the American Bar Association; dual role of advocate and witness.—On April 25, 1975, the court issued the following order:

Before SKELTON, *Judge*, Presiding, KUNZIG and BENNETT, *Judges*.

"Defendant appeals pursuant to Rule 53(c)(2)(ii) from a trial judge's order filed March 17, 1975, denying defendant's 'Motion for an Order Clarifying the Status of Counsel for Plaintiff.' Defendant argues in its motion that plaintiff's counsel should be disqualified from further participation in the case to prevent an alleged imminent violation of Disciplinary Rules 5–101 and 5–102 of the ABA Code of Professional Responsibility. These Disciplinary Rules state that, with certain exceptions, counsel should not serve as both counsel and material witness in contemplated or pending litigation.[1] The trial judge, while declining to disqualify plaintiff's counsel, expressly declined to take any position on whether the Disciplinary Rules were being violated and deferred this question for the consideration of an appropriate bar association at some later time and place.

"Plaintiff commenced this action on December 2, 1971, seeking a refund of income taxes paid, plus interest, for the tax year ending December 31, 1963. Defendant's answer was filed on March 30, 1972. Pursuant to the standard pretrial order on liability, plaintiff, on or about January 23, 1973, filed its pretrial submission wherein it listed as proposed witnesses, *inter alia*, Burton W. Kanter, Esquire, Calvin Eisenberg,

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[1] In pertinent part, Disciplinary Rules 5–101 and 5–102 state:

DR 5–101 Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment.

(A) * * *

(B) A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify:

(1) If the testimony will relate solely to an uncontested matter.

(2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.

(3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client.

(4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

DR 5–102 Withdrawal as Counsel When the Lawyer Becomes a Witness.

(A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5–101(B) (1) through (4)."

Esquire, and Robert Levin, Esquire. Mr. Kanter is attorney of record for plaintiff in this litigation. Mr. Eisenberg and Mr. Levin are members of the same law firm with which Mr. Kanter is associated, *i.e.*, Levenfeld, Kanter, Baskes & Lippitz, of Chicago, Illinois.[2] Pretrial submissions were completed on or about May 10, 1973, and attempts to settle and/or stipulate, and further discovery followed. On January 10, 1975, defendant first raised the issue of the propriety of plaintiff's counsel serving also as material fact witnesses on the question of whether a timely claim for refund was filed by plaintiff. The motion in question was filed on February 18, 1975.

"The Rules prohibiting, with stated exceptions, counsel's acting in the dual role of advocate and witness, protect both the client and the public interest.[3] Plaintiff, the client, has indicated in a letter before the court that it is fully aware of potential prejudice arising out of the anticipated dual role of its counsel, but implores his counsel to continue to represent him nevertheless because of his extensive work over a long period on the case and familiarity with it. He states that 'to lose your firm as trial counsel at this stage would be a blow of incalculable proportions to our prospects of obtaining a fair settlement or a just disposition of our claim.' Defendant achieves no personal gain from disqualification of plaintiff's counsel and thus is acting in the public interest.

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[2] Plaintiff's present intention is apparently to use only Mr. Eisenberg as a witness.

[3] *See, i.e., Erwin M. Jennings Co.* v. *DiGenovo*, 141 A. 866, 868 (Sup. Ct. of Errors of Conn. 1928):

> * * * Our rule is founded upon our belief that it is unfair to the client that his case should be presented through witnesses whom the trier will necessarily treat as interested, not only through the zeal of advocacy, but also through interest in the result of the trial, instead of as witnesses without self-interest or other zeal than that of the ordinary witness. It is also and primarily founded upon the obvious dictate of public policy, which requires that the profession of the law shall be practiced so as to avoid the bringing of distrust and suspicion upon its members who serve as witnesses in establishing the facts of a complaint or defense, and then as advocates in pressing home to the trier the truth of their statement as witnesses. Our court has always looked with great disfavor upon the giving of testimony by an attorney who is a participant in the trial of the cause in which he is a witness for the reason that we hold it to be against sound public policy and the integrity and welfare of the profession of the law that the attorney should be at one and the same time the advocate and material witness for his client. * * *

"We believe that the court, in an appropriate case, has a responsibility to examine an allegation of violation of professional ethics and to uphold the integrity of the legal process. *Cf. Emle Industries, Inc.* v. *Patentex, Inc.*, 478 F. 2d 562, 564–65 (2d Cir. 1973); *Richardson* v. *Hamilton Intern'l Corp.*, 469 F. 2d 1382, 1385 (3d Cir. 1972), *cert. denied*, 411 U.S. 986 (1973). The Canons of Professional Responsibility are applicable to proceedings in this court, and we have inherent power to assist in their enforcement. In the instant case, an appeal pursuant to our Rule 53(c)(2)(ii) is appropriate, for if we refused to consider an appeal until after trial, the harm, if any, to the public interest would already be done. Disqualification of plaintiff's counsel on appeal after trial would be a manifest waste of the resources of the parties and the court and unfair to plaintiff.

"After consideration of the Disciplinary Rules, the trial judge's order, and the briefs of the parties, we have concluded, without oral argument, that, under the particular facts of this case, as they have been presented to us, counsel for plaintiff fall within the fourth exception to those Rules, *supra*, and that as a result counsel's anticipated dual role at trial is not a violation of the Rules.[4] The trial judge will evaluate the credibility of the witness and his testimony as he will for others who appear before him. We consider that the question left is one of the weight to be accorded the testimony, having decided it may be received.

"Defendant wasted more than 2 years after having been apprised of plaintiff's counsel's intent to testify in this case before seeking clarification of his status. During this period extensive pretrial investigations went forward, and other preparations were made for trial. Disqualification of plaintiff's counsel at this junction would thus 'work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel' in the case.[5] Accordingly,

"IT IS ORDERED that the trial judge's order be and is affirmed as modified herein."

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[4] Counsel for plaintiff assert that they fall within the other exceptions as well. We find it unnecessary to reach that question. We also find it unnecessary to reach plaintiff's argument concerning the possible impact of the Freedom of Information Act.

[5] Trial, having been twice previously postponed, is now set for May 14–16, 1975.

No. 249–73. APRIL 25, 1975

Southwest Engineering Company, Inc.

Contracts; changed conditions; subsurface rock conditions; administrative remedies; suspension of work clause; limitation of actions; accrual of cause of action; Davis-Bacon Act; classification of workers.—Plaintiff seeks review of adverse administrative decisions on claims arising under three different construction contracts. Respecting Count I, plaintiff contracted to construct additional sanitary and water supply facilities at Pomme de Terre Reservoir, Missouri, during performance it encountered certain rock formations which could not be removed by backhoe, and plaintiff had to use blasting and jack hammers resulting in additional costs for which it claims an equitable adjustment as a category (1) changed condition. The Board concluded that a category (1) changed condition was not present because the contract documents did not provide affirmative indications of subsurface conditions in the areas for the water and sewerlines where the rock excavations were required. Furthermore, the contractor admitted having knowledge of some area rock formations gained during performance of a previous contract, and thus the conditions were not unknown or unusual as required by the category (2) changed conditions clause. Respecting Count II, plaintiff entered into a fixed-price contract to construct an air conditioned masonry wall VORTAC facility, including related roadway, parking, etc., at Hays Municipal Airport, Kansas. Plaintiff was allowed administratively additional time extensions that permitted remission of liquidated damages, and now seeks (2) review of the Board's denial (for failure to give timely notice) of a claim for expenses of its job superintendent allegedly incurred because of a change in the starting date of the project; plaintiff also seeks (3) its job foreman's standby expenses during a delay (denied by the Board because plaintiff failed to prove that the foreman was idle during the period); and also seeks (4) the cost of an electric distribution panel board which it asserts the contract required to be supplied as Government-furnished property. Respecting Count III, this claim involves alleged violations of the Davis-Bacon Act, 40 U.S.C. § 276a, occurring during

performance of a lump-sum contract for installation of a high intensity approach lighting system at McConnell Air Force Base, Kansas. The contracting officer issued a decision that the workmen who installed the fiber duct should have been paid electricians' and not laborers' wages; plaintiff appealed this decision to the ASBCA which thereupon referred the matter to the Secretary of Labor and he concluded that the proper classification was electricians. Thereafter the Board dismissed the appeal for lack of jurisdiction on the ground that the Labor Secretary's determination was final and not subject to review. Defendant asserts that this claim is time-barred because the Secretary's ruling was made more than 6 years before the petition was filed. In a recommended decision filed October 11, 1974 (reported in full at 20 CCF para. 83,406), Trial Judge Kenneth R. Harkins concluded: re Count I, that the Board was correct in denying the claim; as to Count II, claim (2), that plaintiff is entitled to an equitable adjustment because the claim was filed as soon as practicable after the termination of the Government's interrupting acts; as to Count II, claim (3), that since plaintiff could not establish that this delay resulted in increased costs because it could not show that its foreman in fact was idle plaintiff is not entitled to recover; as to Count II, claim (4), which is concerned only with contract and drawing interpretation, the Board was correct in its conclusion that the panel board was to be furnished by the contractor at no additional cost; as to Count III, that plaintiff's claim is not barred by the statute of limitations because the Labor Secretary's ruling was not the final "mandatory administrative determination" contemplated in *Nager Electric Co.* v. *United States*, 177 Ct. Cl. 234, 368 F. 2d 847 (1966), and that the Secretary's classification determination was based on substantial evidence and is final and conclusive. This case came before the court on the parties' requests for review of the recommended decision on plaintiff's motion and defendant's cross-motion for summary judgment, having been submitted on the briefs, without oral argument by counsel. Upon consideration thereof, since the court agrees with the recommended decision, the court by Order dated April 25, 1975

adopted the said decision as the basis for its judgment in this case, and concluded and ordered that plaintiff's motion for summary judgment is denied as to Counts I and III and as to claims (3) and (4) of Count II, that defendant's motion for summary judgment as to these Counts and claims is granted, and that the petition is dismissed as to them. The court also ordered with respect to claim (2) of Count II, pursuant to Pub. L. 92–415, 28 U.S.C. § 1491 (Supp. III, 1973), and Rules 149 and 150, remand to the Department of Transportation Contract Appeals Board to determine whether the expenses claimed were in fact incurred as a result of the delayed starting date.

On June 19, 1975 the Contract Appeals Board dismissed the appeal with prejudice as settled after the parties reached a negotiated settlement and payment in full was made. On July 10, 1975 the court dismissed with prejudice as settled claim (2) of Count II of the petition.

No. 454–73. APRIL 25, 1975

Thomas Arthur Garrigan

Civilian pay; back pay; reinstatement; classification action; Civil Service Commission function.—On April 25, 1975 the court issued the following order:

Before SKELTON, *Judge*, Presiding, KUNZIG and BENNETT, *Judges*.

"This case is before the court on defendant's motion for summary judgment to defeat plaintiff's claim that he was improperly reduced in grade as a result of a reduction-in-force, by the Department of the Army. Plaintiff asserts alleged procedural erorrs and the right to 'bump.' He has exhausted his administrative remedies by a grievance appeal and an appeal to the Civil Service Commission. Plaintiff claims back pay and the right of reinstatement to the higher grade which he lost in the RIF. He also asserts that defendant was wrong in finding him unqualified for another job, AMMO Quality Control Specialist, GS–9, and says this is an issue of fact requiring trial.

"We have carefully examined plaintiff's responses to defendant's motion but conclude that plaintiff has not stated

a claim for which relief can be granted within the jurisdiction of this court. In short, what plaintiff claims is the right of appointment and a challenge to his classification. The Civil Service Commission was requested by the Department of the Army in this case to make a qualifications determination. This was proper. 5 U.S.C. §§ 5105, 5110, 5112 (1970). Plaintiff agreed to this procedure at the time. The CSC found plaintiff not qualified for the position he claims and which he says was held by others with lower retention rights. The action of the CSC is presumed to be correct. Plaintiff has failed to overcome the presumption. After a hearing, and after the CSC determination, the Army Materiel Command denied plaintiff's grievance. We find no legal or procedural error, or evidence of arbitrary or capricious action, or abuse of discretion, either by the Army or the Civil Service Commission.

"IT IS ORDERED, on the authority of *Wilmot* v. *United States*, 205 Ct. Cl. 666 (Dec. 1974), *DiRocco* v. *United States*, 201 Ct. Cl. 867 (1973), *Bookman* v. *United States*, 197 Ct. Cl. 108, 116, 453 F. 2d 1263, 1267 (1972), *Tierney* v. *United States*, 168 Ct. Cl. 77 (1964), and *Donnelly* v. *United States*, 133 Ct. Cl. 120, 134 F. Supp. 635 (1955), that defendant's motion for summary judgment be and it is hereby allowed, and the petition is dismissed."

No. 56–74. APRIL 25, 1975

E. J. T. Construction Company, Inc.

Contracts; differing site condition; subsurface water; heavy rainfall.—Plaintiff, an experienced construction contractor familiar with the construction site, contracted with the Department of the Army to construct a field training facilities building, together with certain appurtenant work, at Dover Air Force Base, Delaware. Plaintiff contended administratively and before this court that during contract performance it encountered a level of subsurface water constituting a site condition differing materially from that represented in the contract documents provided at the time the contract was bid. These documents contained drill hole and auger boring data, the drill hole logs (within the perimeter

of the proposed building) indicating water at differing depths below ground surface. Plaintiff determined that a sump pump would adequately remove the quantity of water it anticipated encountering. Shortly after receiving notice to proceed the area experienced unusually heavy rainfall and because of the higher level of water encountered plaintiff was forced to use a more complex and costly method of dewatering than the sump pump method. Plaintiff's claim for an equitable adjustment under the Differing Site Conditions clause because of the increased cost of the substitute dewatering system was denied administratively. In a recommended decision filed January 14, 1975 (reported in full at 20 CCF para. 83,630), Trial Judge Harry E. Wood concluded that the variations in the water table level were not the result of any error in contract information but of unusually heavy rainfall at the site and its consequent impact upon the water table level, that defendant did not mislead plaintiff, and that the increased costs must be borne by plaintiff. This case came before the court on defendant's motion requesting the court to adopt the recommended decision on plaintiff's motion and defendant's cross-motion for summary judgment, plaintiff having filed no request for review thereof by the court and the time for so filing having expired. Upon consideration thereof and without oral argument, since the court agrees with the recommended decision, by Order dated April 25, 1975 the court granted defendant's motion and adopted the decision as the basis for its judgment in this case, concluded that plaintiff is not entitled to recover, denied plaintiff's motion for summary judgment, granted defendant's cross-motion, and dismissed the petition.

No. 202–74. APRIL 25, 1975

Rebecca Bibbs, as Administrator of the Estate of Wayne Bibbs, Deceased, and Homer Bibbs and Rebecca Bibbs, Individually

Court of Claims jurisdiction; tort claim.—Plaintiffs allege that officers and representatives of the United States Army entered into negotiations with decedent, a minor, and

his parents leading to agreements whereby the parents gave their consent to the enlistment of their son on condition that he would not be assigned to a combat zone or to combat duties until he reached 18, that the agreement was breached when defendant sent the son into Vietnam and assigned him to a helicopter engaged in combat activities, and that he was subsequently shot down by enemy fire and killed. The parents and administrator of the estate of decedent seek damages for said death. On April 25, 1975 the court issued the following order:

Before SKELTON, *Judge*, Presiding, KASHIWA and KUNZIG, *Judges.*

"This case comes before the court on defendant's motion to dismiss, filed September 23, 1974, on the ground that the petition sounds in tort and that this court has no original jurisdiction of tort actions. *McCreery* v. *United States*, 161 Ct. Cl. 484 (1963). Upon consideration thereof and of plaintiffs' response and of defendant's reply and of plaintiffs' response thereto, the court concludes that the motion should be granted because the action though pleaded in a contract form is an action sounding in tort over which this court has no jurisdiction under 28 U.S.C. § 1491 (1970); *Martilla* v. *United States*, 118 Ct. Cl. 177 (1950); *Eastport Steamship Corp.* v. *United States*, 178 Ct. Cl. 599, 372 F. 2d 1002 (1967); *Clark* v. *United States*, 198 Ct. Cl. 593, 461 F. 2d 781, *cert. denied*, 409 U.S. 1028 (1972); and on the basis thereof,

"IT IS ORDERED that defendant's motion to dismiss is hereby granted and that plaintiffs' petition be and the same is hereby dismissed."

Plaintiffs' motion for reconsideration was denied May 30, 1975.

APP. No. 7–74. APRIL 25, 1975

The Sac and Fox Tribe of Indians of Oklahoma, et al., and Related Appeals, Appellants

Indian claims; appeal from Indian Claims Commission; valuation of ceded Indian lands.—Appellants appealed from the original valuation opinion and final awards of the Indian Claims Commission dated May 12, 1968 (20 Ind. Cl. Comm.

439) respecting claims for additional compensation for three tracts of land in eastern Iowa ceded to the United States. In an opinion reported at 196 Ct. Cl. 548 (1971), App. No. 4–70, this court remanded the case to the Commission for further proceedings to supply more specific findings and reasoning as to the Commission's valuations. On November 23, 1973 the Commission issued an opinion and final award on remand (32 Ind. Cl. Comm. 256), and from the final award this appeal was filed. On April 25, 1975 the court entered the following order:

Before SKELTON, *Judge*, Presiding, DURFEE, *Senior Judge*, and KUNZIG, *Judge*.

"This case comes before the court on appeal from the decision of the Indian Claims Commission in its Dockets 158, 209 and 231, having been presented and submitted to this court on the briefs and oral argument of counsel. Upon consideration thereof,

IT IS ORDERED that the decision of the Indian Claims Commission from which the appeals have been taken be and it is *affirmed*."

Appellants' motion for rehearing *en banc* was denied June 27, 1975.

APP. No. 9–74. APRIL 25, 1975

The Sac and Fox Tribe of Indians of Oklahoma, et al., Appellants

Indian claims; appeal from Indian Claims Commission; acreage and fair market value.—Appellants appealed from the decision and final award of the Indian Claims Commission dated December 28, 1973 (32 Ind. Cl. Comm. 320) determining the fair market value as of January 25, 1805 of the 3,651,424.39 acres of aboriginal title land ceded by the Sac and Fox Indians to the United States, the land being located in what is now northeast Missouri, northwest Illinois and southwest Wisconsin. They also appealed from the decision excluding 211,275.61 acres in Spanish grants within the

perimeter boundaries of the Missouri tract. On April 25, 1975 the court issued the following order:

Before SKELTON, *Judge*, Presiding, DURFEE, *Senior Judge*, and KUNZIG, *Judge*.

"This case comes before the court on appeal from the decision of the Indian Claims Commission in its Docket 83, having been presented and submitted to this court on the briefs and oral argument of counsel. Upon consideration thereof,

"IT IS ORDERED that the decision of the Indian Claims Commission from which this appeal has been taken be and it is *affirmed*."

Appellants' motion for rehearing *en banc* was denied June 27, 1975.

No. 255–73. MAY 2, 1975

Edwin R. Fredrick

Civilian pay; reduction in force; agency priority placement program; agency discretion.—On May 2, 1975 the court issued the following order:

Before COWEN, *Chief Judge*, SKELTON and KASHIWA, *Judges*.

"This case comes before the court on defendant's motion for rehearing to amend the decision and judgment entered in this case on December 18, 1974 (205 Ct. Cl. 791, 507 F. 2d 1264), on the ground that the Agency's Priority Placement Program gave it the discretion to rehire plaintiff or someone equally qualified. Upon consideration of the motion, together with copies of pertinent regulations, an affidavit by Garold Muncie, and a letter of August 1, 1972, addressed to Charles K. Tinkler; and also upon consideration of plaintiff's response to the motion, the court finds:

"(1) On June 9, 1972, plaintiff applied to the Defense Supply Agency for the vacant position of Quality Assurance Specialist, GS–11, under the Department of Defense Instruction 1404.5, Nation-Wide Centralized Referral System for Displaced Department of Defense Employees, but

the Agency appointed Mr. Raymond A. Johnson to the position instead of plaintiff;

"(2) that Section VII, Sub-part D of the Priority Placement Program, which was in effect at that time, contained an exception which incorporated the following provisions of the Federal Personnel Manual, Chapter 335, Subchapter 4–3c(1):

> *General.* An agency must provide for an exception to competitive promotion procedures to allow for repromotion to a grade or position from which an employee was demoted in the agency without personal cause, that is, without misconduct or inefficiency on the part of the employee and not at his request. An agency may provide the same exception for employees who were demoted without personal cause in another agency. Acceptance of a lower-grade position in lieu of reduction in force or in lieu of relocation in a transfer of function is not a demotion at the employee's request for this purpose.

"(3) Mr. Johnson had previously been demoted from a Missile Site Activity, Missile Quality Control Representative, GS–11, to Mechanical Quality Control Representative, GS–9, on November 9, 1963. The affidavit of Mr. Muncie shows that the demotion was without personal cause within the meaning of the Federal Personnel Manual, as quoted above. As a result, Mr. Johnson was qualified for repromotion under the regulations then in force. His name and Mr. Fredrick's name were referred to the Selecting Supervisor, along with names of other individuals entitled to special consideration for promotion. The Selecting Supervisor had the discretion to select any one of these individuals, and he chose Mr. Johnson.

"Based on the foregoing, the court concludes that the officials of the Government did not act unreasonably and did not abuse their discretion in failing to appoint plaintiff. *Drucker* v. *United States*, 204 Ct. Cl. 514, 498 F. 2d 1350 (1974), and *Odian* v. *United States*, 203 Ct. Cl. 306 (1973).

"IT IS THEREFORE ORDERED that the court's decision and judgment of December 18, 1974, is amended to the extent that the order of remand is withdrawn. Defendant's motion

to amend the judgment is granted and plaintiff's petition is dismissed."

Nos. 446-69, 447-69, 448-69 AND 449-69. MAY 30, 1975

Trustees of the Graceland Cemetery Improvement Fund, Et Al.

On May 30, 1975, the court issued the following order:

Before SKELTON, *Judge*, Presiding, NICHOLS and BENNETT, *Judges*.

"These cases come before the court on defendant's motion for rehearing and suggestion for rehearing *en banc*, filed April 30, 1975, pursuant to Rules 151 and 7, and on plaintiff's protective motion for rehearing, filed April 30, 1975. Upon consideration thereof, together with the responses in opposition thereto, without oral argument, by the seven active Judges of the court as to the suggestion for rehearing *en banc* under Rule 7, which suggestion is denied, and further having been so considered by the panel listed above as to the motions of the parties for rehearing under Rule 151,

"IT IS ORDERED that the slip opinion entered herein on April 16, 1975 [*ante*, at 609], be and the same is amended as follows:

"1. That the second sentence and citations [starting with the words "The profit factor" and ending with the date "(1972)"] appearing at lines 8 through 13 of page 24 [*ante*, lines 3-8, page 637], are deleted and the following is inserted in lieu thereof:

> The profit factor is really only significant insofar as it is a means of distinguishing between an enterprise carried on in good faith as a "trade or business" and an enterprise carried on merely as a hobby, 4 A MERTENS, LAW OF FEDERAL INCOME TAXATION § 25.08 (1972), or for determining whether profit and nonprofit activities of a single taxpayer may be aggregated and treated as a single integrated trade or business, *Iowa State University of Science and Technology* v. *United States*, 205 Ct. Cl. 339, 500 F. 2d 508 (1974).

"2. That the last sentence and citation [starting with the words "Given the particular" and ending with the word

"*supra*"] appearing at lines 15 through 19 of page 24 [*ante*, lines 10–14, page 637], are deleted and the following sentence and footnote are inserted in lieu thereof:

> Given the particular circumstances of this case the fact that plaintiff is a nonprofit enterprise should not necessarily preclude his taking a trade or business expense deduction, at least to the extent of income received by it. *See, e.g. Anaheim Union Water Co.* v. *Commissioner*, *supra*.[1]

[1] In *Iowa State*, *supra*, we disapproved of Anaheim to the extent it permitted a taxpayer to aggregate his profit and nonprofit making activities and deduct costs associated with a nonprofit function from income generated by unrelated profit-making activities. Where our language in *Iowa State* implies a disapproval broader in scope it concerns issues not before the court in that case and is therefore dicta, not controlling here.

"3. That the second full paragraph appearing at lines 20 through 28 of Page 24 [*ante*, lines 15–23, page 637], beginning with the word "In" and ending with the word "profit", is deleted.

"IT IS FURTHER ORDERED that, except as set forth above, no further changes or amendments are to be made in the said opinion of April 16, 1975, and that in all other respects the parties' motions for rehearing are denied."

JUDGMENT ORDERS

GEORGE S. GROVES, MABEL M. GROVES, AND WESTCHESTER BETTER HOMES, INC. *v.* THE UNITED STATES

No. 318–68

[202 Ct. Cl. 660]

On January 10, 1975 the court ordered that judgment be entered for plaintiffs in the sum of $49,125.83.

ALABAMA DISPLAYS, INC. V. THE UNITED STATES

No. 155–70

KENTUCKY DISPLAYS, INC. V. THE UNITED STATES

No. 156–70

TUSCALOOSA ADVERTISING, INC. V. THE UNITED STATES

No. 157–70

[205 Ct. Cl. 716, 507 F. 2d 844]

On January 31, 1975 the court ordered that judgment be entered for plaintiffs, with interest as provided by law, in the sums as follows:

Alabama Displays, Inc	$7,483.16
Kentucky Displays, Inc	3,603.68
Tuscaloosa Advertising, Inc	5,247.74

RICHARD J. SELMAN V. THE UNITED STATES

No. 421-72

GEORGE S. H. SHARRATT, JR. *v.* THE UNITED STATES

No. 422-72

[204 Ct. Cl. 675, 498 F. 2d 1354]

On February 7, 1975 the court ordered that judgment be entered for Richard J. Selman in the sum of $11,447.28 with $589.85 to be withheld and credited to his 1975 FICA account and $2,016.61 withheld and credited to his 1975 Federal income tax account, the balance of $840.82 to be paid to plaintiff and for George S. H. Sharratt, Jr. in the sum of $7,111.52 with $368.11 to be withheld and credited to his FICA account and $1,258.53 to be withheld and credited to his 1975 Federal income tax account, the balance of $5,484.88 to be paid to plaintiff.

JOHN YODER V. THE UNITED STATES

No. 154-73

[204 Ct. Cl. 931]

On February 28, 1975, in accordance wtih a stipulation of the parties, the court ordered that judgment be entered for plaintiff in the sum of $16,150.

AMERICAN EXPORT ISBRANDTSEN LINES, INC., ET AL. V. THE UNITED STATES

No. 402-70

[204 Ct. Cl. 424, 499 F. 2d 552]

On March 7, 1975 the court ordered that judgment be entered for the plaintiffs and in the amounts listed below:

American Export Lines, Inc	$841,271.00
American President Lines, Ltd	421,447.66
Farrell Lines Incorporated	320,909.65

Gulf & South American Steamship Co., Inc	$78, 903. 30
Lykes Bros. Steamship Co., Inc	703, 439. 77
Moore-McCormack Lines, Inc	1, 018, 553. 26
Prudential Lines, Inc	894, 943. 00
PSS Steamship Company, Inc	55, 593. 41
United States Lines, Inc	926, 523. 49

ROBERT PAGE BURR AND ELIZABETH LONG BURR V. THE UNITED STATES

No. 139–69

[204 Ct. Cl. 821, 824]

On March 7, 1975 the court ordered that judgment be entered for plaintiffs in the sum of $719.80, plus statutory interest as provided by law.

EMERY AIR FREIGHT CORPORATION V. THE UNITED STATES

No. 390–71

[205 Ct. Cl. 49, 499 F. 2d 1255]

On March 14, 1975 the court ordered that judgment be entered for plaintiff in the sum of $23,996.44.

FARRELL LINES INCORPORATED V. THE UNITED STATES

No. 42–72

[204 Ct. Cl. 482, 499 F. 2d 587]

On April 1, 1975, the court ordered that judgment be entered for plaintiff in the amount of $2,121,551. Judgments were also entered in the following related cases:

No. 50–72	Lykes Bros. Steamship Co., Inc	$5, 190, 548
No. 56–72	American Export Lines, Inc	2, 025, 961
No. 57–72	American President Lines, Ltd	2, 332, 837
No. 58–72	Gulf & South American Steamship Co., Inc	568, 421
No. 59–72	Prudential Lines, Inc	2, 468, 074
	PSS Steamship Co., Inc	274, 242
No. 68–72	Pacific Far East Line, Inc	987, 251
No. 69–72	States Steamship Co	1, 110, 453

No. 70–72	United States Lines, Inc.	$2,694,207
No. 80–72	Moore-McCormack Lines, Inc.	3,137,708
No. 87–72	American President Lines, Ltd.	683,239
No. 88–72	Delta Steamship Lines, Inc.	2,590,756
No. 89–72	The Oceanic Steamship Co.	539,147

REPORT OF DECISIONS
OF
THE SUPREME COURT
IN COURT OF CLAIMS CASES

Action was taken by the United States Supreme Court on the parties' petitions for writs of certiorari as follows:

Petitioners	Ct. Cl.	F. 2d	Supreme Court
			Denied
Anthony Haswell No. 181–71	205:421	500:1133	Jan. 13,1975 419 U.S. 1107
Seminole Nation of Oklahoma App. 4–73	204:655	498:1368	Jan. 27, 1975 420 U.S. 907
Mercy N. Clincher, et al No. 25–73	205:8	499:1250	Mar. 24, 1975 420 U.S. 991
Rose Marie Porter, et al No. 111–73	204:355	496:583	Mar. 31, 1975 420 U.S. 1004
Clifford C. Terry No. 13–73	204:543	499:695	Apr. 14, 1975 421 U.S. 912
Mrs. Winston Caldwell No. 326–70	202:423	481:898	Apr. 14, 1975 421 U.S. 912
Yellowstone Pine Co No. 144–74	205:867		Apr. 28, 1975 421 U.S. 948
			Granted
Herman R. Testan, et al No. 128–72	205:330	499:690	Feb. 18, 1975 420 U.S. 923
			Affirmed
Williams & Wilkins Co No. 73–68	203:74	487:1345	Feb. 25, 1975 420 U.S. 376

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